



Law Society
of Scotland

The House of Lords Constitution Committee European Union (Withdrawal) Bill Inquiry

Evidence by the Law Society of Scotland

September 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Constitutional Law Sub-committee welcomes the opportunity to consider and respond to the House of Lords Constitution Committee European Union (Withdrawal) bill inquiry.

General Comment

The UK's exit from the EU is arguably the most significant constitutional development to affect the UK since 1945. The UK's exit from the EU has so many significant aspects including economic, financial, legal, social, and cultural, which will affect every person living in the British Isles and it has as much potential to affect people living in the EU in some ways which are known and understood and in other ways which are currently unpredictable. The impact of the change however will also have a breadth, depth and far reaching effect for the immediate future and for several years to come.

Accordingly the European Union (Withdrawal) Bill is perhaps the most constitutionally significant measure to come before Parliament for many years. The long title of the bill implies that the bill is relatively simple. It states that the bill is to *Repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU*. This is however no short or easily understood bill. In our view it is very complex, sometimes difficult to interpret, and often lacking in clarity. This bill will deconstruct the supranational legal order to which the UK has belonged since 1972 and reconstruct in the domestic legal order many aspects of that accumulated body of EU law. Parliament will have a difficult task in properly scrutinising the bill in the time allowed. The Government should be generous and permissive with suggestions to improve or clarify the bills clauses as it passes through Parliament.

We also recommend that the Government commence an early programme of consultation on the draft subordinate legislation which will be needed under the bill. The large number of orders and the relatively short period for scrutiny means that early consultation will be important in ensuring that the transposition of EU law into UK law can be as efficient as possible.

Specific Comment

Clause 1 - Repeal of the European Communities Act 1972

Clause 1 of the bill repeals the European Communities Act (ECA) 1972 on exit day which is a date to be appointed in regulations by a Minister of the Crown. The precise date is currently unknown but in terms of Article 50 of the TEU the Treaties cease to have effect upon the expiry of two years from the notification of withdrawal date unless the Withdrawal Agreement is completed or the period of negotiation is extended. Accordingly the current working hypothesis is that the UK will leave the EU at the on 29 March 2019.

The ECA's repeal will remove the legal method for reception and implementation of the EU Treaties, the mechanisms for referring matters to the CJEU, the provisions for repeal and amendment of the law and a number of other specific provisions concerning the Common Agricultural Policy, EU Offences, Furnishing of Information to the EU and the adoption of pre-accession treaties including the European Coal and Steel Community Treaty, the European Economic Community Treaty, the Euratom Treaty and a number of other Agreements relating to institutions such as the Council and the Commission. The explanatory notes state this will have the effect of “removing the mechanism for the automatic flow of EU law into UK law... and removing the power to implement EU obligations (paragraph 18)”. The UK will therefore “cease to have obligations under EU law” going forward.

Our Comment

1.1 This will achieve the Government's objective of repealing the ECA on exit day.

Clause 2 - Saving for EU – derived domestic legislation

Clause 2 is the saving provision for EU-derived domestic legislation and provides that:

(1) EU-derived domestic legislation, as it has effect in domestic law immediately before exit day, continues to have effect in domestic law on and after exit day

Clause 2(2) defines EU derived domestic legislation as meaning any enactments, so far as:

(a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the European Communities Act 1972,

“(b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act...”

Enactment is defined in clause 14(1) as meaning “*an enactment whenever passed or made*” and includes:

(a) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament....”

Our Comment

2.1 This will achieve the Government's objective of retaining the EU-derived domestic legislation and maintaining its effect after the exit day, subject to the exceptions in clause 5 and Schedule 1. However there are some issues about the meaning and effect of this provision.

2.2 The intention would appear to be to include any enactment which has effect in domestic law immediately before exit day (i.e. any pre exit enactment) but, in view of the reference in clause 2(2)(b) to any enactment “passed or made”, what happens about:

- i. any bill for an Act of the Scottish Parliament (ASP) which has been passed but not yet enacted (i.e. received the Royal Assent before exit day)? It is assumed that it is only intended to refer to enactments which are enacted or made but this provision appears to assume that Acts are enacted as soon as they are passed. This is the case with UK Acts but it is not the case with ASPs –see the comment at 5.2 below. It is therefore suggested that the reference to “passed” in clause 2(2)(b) needs clarification.
- ii. an enactment which has been enacted or made before that day but not yet commenced? In view of the fact that clause 2(1) refers to “*EU-derived legislation as it has effect in domestic law immediately before the exit day*”, it is assumed that it may only be intended to refer to enactments which have been commenced and taken effect but this should also be clarified; and,
- iii. an enactment which is in force before exit day but which is stated to apply after that day? Clause 2(1) suggests that it may only be intended to refer to an enactment as it is operative before exit day. However, in view of the fact that this is expressly spelt out in the definition of “direct EU legislation” in clause 3(3)(a) and not in clause 2, this should be clarified.

Clause 3 - Incorporation of direct EU legislation

Clause 3 provides that “direct EU legislation” so far as “operative” immediately before exit day forms part of UK law on and after exit day.

Our Comment

3.1 This will achieve the Government’s objective of converting direct EU legislation into domestic law on and after exit day, subject to the exceptions in clause 5 and schedule 1. However it is recognised that some of this legislation will need to be amended in order to operate effectively using the powers in clause 7.

Clause 4 - Saving for rights etc. under section 2(1) of the ECA

Clause 4 provides that any rights, powers, liabilities, obligations, restrictions, remedies and procedure which are recognised, available and enforced before exit day will continue on and after that day to be recognised, available and enforced in domestic law.

This is also subject to clause 5 and Schedule 1.

Our Comment

4.1 This will achieve the Government’s objective of ensuring that remaining EU rights and obligations which are not specifically dealt with in clauses 2 or 3 will continue on and after exit day to be recognised, available and enforced in domestic law.

4.2 Clause 4 is a general sweep up clause which ensures that any remaining right not covered by clauses 2 or 3 will continue to be recognised and available in domestic UK Law. The explanatory notes clarify that these include rights related to the four freedoms such as non-discrimination on the ground of nationality, citizenship rights, rights of movement and residence deriving from EU citizenship, Customs Union, free movement of workers, freedom of establishment and the freedom to provide services, free movement of capital, competition law, internal taxation, economic co-operation and equal pay and the European Investment Bank. Such directly effective rights will also include those arising under other treaties such as the EEA Agreement, Euratom and International Agreements made by the EU with third countries and multilateral agreements to which both the EU and the UK are a party (paragraph 89).

4.3 We question how this clause will apply to directly effective rights such as those relating to free movement of persons, goods, capital and services as expressed in the treaties. The explanatory notes state that it is “the right itself that is converted not the text of the article itself.” (paragraph 88). In our view it is very difficult to divorce the right from the text which creates it. Ministers should explain how this actually will work in practice.

4.4 We also question how effective the continued enforcement of these rights will be in view of paragraph 3 of Schedule 1 which provides:

“3 (1) *There is no right of action in domestic law on or after exit day based on a failure to comply with any of general principles of EU law.*

(2) *No court or tribunal or other public authority may, on or after exit day—*

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.”

Ministers should explain how the rights which are referred to in clause 4 relate to the general principles of EU law and, to the extent that they consist of, or fall within, those general principles, how it is envisaged that those rights will be available and able to be enforced in domestic law.

Clause 5 - Exceptions to savings and incorporation

Clause 5 details two exceptions to the saving and incorporation provisions in clause 2 and 3. These are that:-

(a) The principle of the supremacy of EU law will not apply to any enactment or rule of law passed or made on or after exit day but will apply to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

(b) The Charter of Fundamental Rights is not part of domestic law on or after exit day.

Our Comment

Principle of supremacy of EU law

5.1 We are concerned about the approach taken in Clause 5(1) which states that: *The principle of the supremacy of EU Law does not apply to any enactment or rule of law passed or made on or after exit day.* What is the actual intended effect of this provision? Is it merely a declaratory sub-section or does it simply pave the way for the retention of the principle in Clause 5(2).

In our view there is a particular difficulty with the application of this principle to retained EU law because it is difficult to interpret to what law the principle in fact applies. Clause 5.2 states that *the principle of the supremacy of EU law continues to apply.....to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.* The relationship between the supremacy of EU law and retained EU law under the bill is not clear as Professor Mark Elliott has identified if “retained EU law is domestic law, can it inherit the “supremacy” of the “EU law”. Questions may also be asked as to whether it applies to all retained EU law or only some retained EU law. How does this supremacy principle apply to EU derived domestic legislation under Clause 2(2) when that domestic legislation has not benefited from supremacy? Does retained EU law under Clauses 3 and 4 benefit from the supremacy of EU law as provided for in Clause 5(2)?

5.2 Clause 5(2) refers to “an enactment passed or made before exit day”. This appears to be intended to refer to enactments which are enacted or made before exit day. Paragraph 96 of the explanatory notes states that an Act is passed when it receives the Royal Assent. However this is not the case for ASPs. An ASP is passed by the Scottish Parliament if it is approved at the end of its final stage but then normally 4 weeks have to elapse before it can be submitted by the Presiding Officer for Royal Assent during which time the bill can be referred by the Advocate General, the Lord Advocate or the Attorney General to the Supreme Court and to the European Court. It is only enacted when it receives Royal Assent – see sections 32, 33, 34 and 36(1)(c) of the Scotland Act 1998. As worded it is therefore suggested that it should be clarified whether it is intended only to apply to ASPs which have been enacted before the exit day and not just passed before that day. This raises a similar point as in comment 2.2 above.

5.3 Clause 5(2) only refers to “an enactment passed or made before exit day”. It is not necessary for the enactment to be in force or operative before that day. This is therefore different from the scope of EU derived legislation in clause 2(1). As clause 5(2) is meant to be an exception to the saving of the provisions in, inter alia, clause 2, should it not match the scope of the saving itself? Otherwise the effect of clause 5(2) would appear to be to apply the principle of the supremacy of EU law to enactments which do not fall within the scope of the saving for EU derived legislation.

We agree with the House of Lords Select Committee on the Constitution which has highlighted the problems with interpreting Clause 5 in its Interim Report on the European Union (Withdrawal) bill (3rd Report session 2017-19 paragraph 34.

Charter of Fundamental Rights

5.4 Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 99 and 100 of the explanatory notes argue that it is unnecessary to include it as part of retained EU law because the Charter merely codifies rights and principles already inherent in EU law and would therefore form part of that law when it becomes retained EU law. However even if this was the case (and this is arguable), it would then make no difference if the Charter did form part of the retained EU law. This does not, therefore, appear to be a sufficient reason for excluding the Charter from forming part of retained EU law in the same way as other pre exit EU law.

5.5 It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. It is therefore suggested that the Government should reconsider its decision not to include the Charter as part of retained EU law which would then form part of domestic law on and after exit day. It would at least be helpful to our domestic courts to rely upon its terms when determining the validity, meaning and effect of retained EU law.

5.6 Although some might argue for the Charter to form part of domestic law for all purposes and quite separate from retained EU law. This might create complications with its relationship to the rights under the ECHR and the Human Rights Act 1998.

General principles of EU law

5.7 Clause 5(5) provides that clause 5(4) does not affect the retention in domestic law of any EU fundamental rights or principles which exist irrespective of the Charter. These fundamental rights or principles are not defined nor identified:-

It would be helpful if the Government could identify what are the fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of “retained general principles of EU law” in clause 6(7). Clause 6(7) defines the “retained general principles of EU law” as -

the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –

(a) relate to anything to which section 2, 3 or 4 applies, and

(b) are not excluded by section 5 or Schedule 1,

This is not a clear or helpful definition. The fundamental rights and principles which exist “irrespective of the Charter” should be set out in the bill.

5.8 However, to the extent that the fundamental rights or principles of EU law which are saved in clause 5(5) fall within the general principles of EU law, the saving appears to have limited effect because of paragraph 3 of Schedule 1 which provides:

3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after exit day—

(a) disapply or quash any enactment or other rule of law, or

(b) quash any conduct or otherwise decide that it is unlawful,

because it is incompatible with any of the general principles of EU law.

These general principles can, however, be used to interpret the meaning of any EU retained law.

We recommend that the Government should reconsider the removal of the Charter of Fundamental Rights and take stock of concerns which are held by many about the potential for erosion of human rights which may occur as the result of the removal of the Charter and the creation of difficulties for the UK Courts interpreting retained EU law in the absence of the Charter.

Clause 6 - Interpretation of retained EU law

Clause 6(1) provides that a Court or Tribunal is not bound by European Court principles or decisions made on or after exit day and cannot refer a matter to the European Court on or after exit day. But clause 6(2) provides that a Court or Tribunal whilst it need not have regard to anything done after exit day by the European Court may have regard to it if it considers it appropriate so to do.

Clause 6(3) provides that questions as to the validity, meaning or effect of retained EU law are to be decided (so far as it is unmodified on or after exit day) in accordance with any retained case law and any retained general principles of EU law whilst having regard to EU competencies and their limits immediately before the exit day.

Clause 6(4) qualifies clause 6(3) by providing that neither the Supreme Court nor the High Court of Justiciary sitting as the Court of Appeal (other than in relation to compatibility issues or devolution issues) is bound by any retained EU case law.

Our Comment

6.1 We agree with the provisions of clause 6(2) and 6(4) and welcome the recognition by the Government that the High Court of Justiciary is the highest criminal court in Scotland from which there is no right of further appeal in criminal matters to the UK Supreme Court (although there can be applications to the UK Supreme Court concerning ECHR compatibility and devolution matters referred to in clause 6(4)(b)(i) or (ii)).

6.2 There is no provision in this clause which expressly deals with the situation where there are pending cases before the domestic courts on exit day. But, given that clause 6(1)(b) appears to be quite absolute in its terms, it could be argued that it would apply to such pending cases and prevent such a court from referring a matter to the ECJ on or after that day even although it could have done so on the previous day. However, it is thought that such a construction might be objectionable on the grounds that it is retrospective if it applies to pending cases.

6.3 There is also no provision in this Clause which deals with the issue of cases pending before the European Court on exit day. The nature of retained EU law is such that it affects economic and governance rules across the spectrum. The impact of EU law on litigants is not exclusively from the top down. We have the following questions:

- Whether all cases, or only some selection of those cases, which are pending before the ECJ on exit day should continue to be dealt with by the ECJ? Or
- Whether it should be possible in any case, which is pending before the Scottish courts on exit day and which raises an EU question, to refer that question to the ECJ on and after exit day?

We note that this is an issue which is the subject of negotiation between the UK and the EU. Both parties have produced negotiating positions. We urge both the UK and the EU to come to an agreement which respects the rule of law, the proper administration of justice and is in the interests of litigants.

6.4 In relation to the definition of “retained EU law” in clause 6(7) it would be helpful to have clarification about when or whether a provision will cease to be retained EU law for instance if it has been modified significantly over time.

Clause 7 - Dealing with deficiencies arising from withdrawal

Clause 7(1) empowers a Minister of the Crown, by regulations, to make such provision as the Minister thinks appropriate: *to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU.*

Clause 7(2) provides examples of those deficiencies such as that the retained provisions have no practical application after the UK has left the EU or that the EU law confers functions on EU entities which no longer have functions in relation to the UK or makes provision for reciprocal arrangements between any part of the UK or a public authority in the UK and the EU, an EU entity, a member state or a public in a member state or other arrangements which follow the same pattern and EU references which are no longer appropriate.

Clause 7(4) provides that regulations may make any provision that could be made by an Act of Parliament. This would enable the regulations to amend or repeal provisions in Acts of Parliament (and ASPs or devolved orders) or to sub-delegate powers, including the power to make regulations, to a public authority. Clause 7(5) further clarifies that the regulations may provide for functions of EU entities to be exercisable by a public authority in the UK and for the establishment of new public authorities in the UK.

These powers are, however, subject to the restrictions in Clause 7(6) which provides that the regulations cannot impose or increase taxation, make retrospective provision, create criminal offences, be made to implement the withdrawal agreement, or amend, repeal or revoke the Human Rights Act 1998 or the Northern Ireland Act 1998.

Clause 7(7) puts a time limit of two years after exit day on the making of regulations under this provision.

Part 1 of Schedule 7 contains provisions relating to the scrutiny of regulations made under clause 7.

Our Comment

7.1 We recognise that it is necessary (a) to adapt retained EU law to enable it to work appropriately in the UK on and after exit day and (b) given the scale of the amendments required and the limited time in which to do it, to confer wide ranging powers, including Henry VIII powers to amend Acts and ASPs, on the UK Government and devolved Governments to do so by regulations.

7.2 However, as the House of Lords Select Committee on the Constitution pointed out, in its Report on “The Great Repeal bill and Delegated Powers” (9th Report, Session 2016-17), the challenge is how to grant such:

relatively wide delegated powers for the purpose of converting EU law into UK law, while ensuring that they cannot also be used simply to implement new policies desired by the Government in areas which were formerly within EU competence We consider that Parliament should address this challenge in two distinct ways. First, by limiting the scope of the delegated powers granted under the Great Repeal bill, and second, by putting in place processes to ensure that Parliament has on-going control over the exercise of those powers...

7.3 We endorse this approach by commenting, firstly, upon the scope of the regulation making powers in clause 7 and, then upon the provisions for the scrutiny of those regulations in Part 1 of Schedule 7 below.

7.4 So far as the scope of the regulation making powers is concerned, the House of Lords Committee considered there should be an express provision that the powers should be used only “so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework”. The bill does not contain any such express provision and the powers conferred are not as restricted as the Committee suggested.

7.5 The powers conferred by clause 7 are limited to make provision: *to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU* but

- what constitutes a failure in the retained EU law to operate effectively is not clear and could be open to argument or subjective opinion (despite the examples of deficiencies in clause 7(2)) because the deficiencies in Clause 7 (2) are not exhaustive nor limited to deficiencies of the same kind.
- what provision is made “to prevent, remedy or mitigate” such deficiencies would be whatever the Minister considered appropriate which could be quite wide ranging.

The House of Lord’s Committee in its Interim Report (3rd Report of session 2017-19) highlighted and reiterated concerns with the delegated powers provisions. We draw attention to paragraphs 35-45 of the Interim Report. The Government should consider limiting these powers by amending the bill in line with the suggestions by the House of Lords Select Committee, such as by restricting:

- a. the deficiencies which might be dealt with by the regulations to those of the same kind as those specified in clause 7(2); and
- b. what provision might be made by the regulations to what is necessary in order to ensure that the retained EU law can operate effectively in domestic law.

7.6 Clause 7(6)(f) provides that the regulations made under clause 7 cannot amend or repeal the Northern Ireland Act 1998. Should this exception should also include a reference to the Scotland Act 1998 and the Wales Act 2017?

7.7 As the regulation power in clause 7 is similar to that in clauses 8 and 9 we suggest that thought should be given to combining the powers into one clause in the bill. This would simplify the bill and make it easier to understand.

Clause 8 - Complying with international obligations

Ministers of the Crown can make regulations to prevent or remedy any breach of the UK's international obligations which occurs as a result of the UK's withdrawal from the EU.

Similar to clause 7, provisions under regulations arising from this section can make any provision that could be made by an Act of Parliament but the regulation making power cannot be used to make retrospective provision, create a criminal offence, implement the withdrawal agreement or amend, repeal or revoke the Human Rights Act 1998.

There is a similar limitation period of that which applies to regulations made under clause 7: two years from the exit date.

Our Comment

8.1 We have no comments upon the scope of clause 8 but comment upon the scrutiny provisions which apply to these regulations in paragraph 5 in Part 2 of Schedule 7 below.

Clause 9 - Implementing the withdrawal agreement

Clause 9(1) empowers a Minister of the Crown, by regulations, to make such provision as the Minister considers appropriate for the purpose of implementing the withdrawal agreement if the Minister considers that such provision should be in force on or before the exit day.

The regulations may make any provision which could be made by an Act of Parliament including the amendment of the European Union (Withdrawal) Act.

Regulations under clause 9 are subject to similar limitations as those made under clauses 7 or 8.

Clause 9(4) provides that regulations under clause 9 cannot be made after exit day.

Our Comment

9.1 It is noted that this power to implement the withdrawal agreement by regulations is restricted to where (a) the regulations are made on or before exit day and (b) the Minister considers that they should be in force on or before exit day. We agree with this restriction.

This is a very wide power because it is not known what will be in the withdrawal agreement, what will be required to implement it and what provision requires to be in force on or before exit day. We suggest that the scope should be expressly restricted to doing only what is necessary for such implementation.

9.2 We comment upon the scrutiny provisions which apply to these regulations in paragraph 6 in Part 2 of Schedule 7 below.

Clause 10 - Corresponding powers involving devolved authorities

Schedule 2 makes provision for the devolved authorities to make subordinate legislation corresponding to the power to deal with deficiencies in clause 7. Our comments are contained in the section of this paper dealing with Schedule 2.

Clause 11 - Retaining EU Restrictions in devolution legislation etc.

Clause 11 amends the legislative competence provisions in section 29 of the Scotland Act 1998 by deleting the provision of section 29(2) (d) which provides that the Scottish Parliament has no competence to legislate incompatibly with EU law by deleting “with EU law” and substituting “a breach of the restriction in subsection (4A)”.

Subsection (4A) is provided for in clause 11(1) (b) which inserts the following into section 29 of the Scotland Act 1998:

(4A) Subject to subsections 4(B) and 4(C) an Act of the Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, retained EU law.

(4B) Subsection (4A) does not apply so far as the modification would, immediately before exit day, have been within the legislative competence of the Scottish Parliament.

(4C) Subsection (4A) also does not apply so far as Her Majesty may by Order in Council provide.

Similar provisions are made for the National Assembly for Wales (clause 11(2)) and the Northern Assembly (clause 11(3)).

Clause 11 also imports parts 1 and 2 of schedule 3 making corresponding provisions in respect of executive competence and other amendments to devolution legislation.

The explanatory notes state that “The amendments will replace the former requirement with the provision which means that it is outside the competence of the Scottish Parliament to modify retained law in a way which would not have been compatible with EU law immediately before exit. This legislative competence test is subject to any exceptions which may be prescribed by an order in Council (paragraph 130)”.

Our Comment

11.1 At present, section 29(2)(b) of the Scotland Act 1998 provides that a provision in an ASP is “not law” if it is incompatible with EU law. The new provision does not simply replace the reference to EU law with a reference to retained EU law so that the Scottish Parliament would be required to legislate in conformity with retained EU law. What it does is to prohibit the Scottish Parliament from modifying or conferring power by subordinate legislation to modify retained EU law. In our view, repealing the requirement to legislate compatibly with EU law is not the same as legislating in such a way as to modify that law.

11.2 In our view, it is not clear what are the ASPs to which this new provision will apply. It appears that it is not intended to be retrospective and that it will only apply to post exit ASPs but what is a post exit ASP? Arguably it is an ASP which is enacted on and after the exit day. But this would mean that the bill for such an ASP would require to comply with this restriction, even although it was introduced months before the exit day and maybe even before the EU (Withdrawal) bill is itself enacted and even although it may have been passed by the Scottish Parliament before exit day. That is an argument that such legislations might be regarded as retrospective. There should be a provision which clarifies what the ASPs are to which this new provision will apply.

11.3 We note the terms of schedule 8 paragraph 29 which provides that the amendments made by section 11 and part 1 of schedule 3 do not affect the validity of:

- (a) any provision of an Act of the Scottish Parliament made and in force before exit day or;
- (b) any subordinate legislation made, confirmed or approved and in force before exit day.

But paragraph 3 of schedule 1 would not appear to allow any challenge to be made on and after exit day, or allow any court to quash any ASP, on the grounds that it does not comply with the general principles of EU law. Schedule 8 paragraph 29(2) which provides that the validity of anything falling within paragraph 1(a) or (b) is to be decided by reference to the law before exit day.

11.4 The effect of the proposed section 29(4A) is to remove from the legislative competence of the Scottish Parliament any matter in retained EU law (i.e. which was subject to an EU competence) even although that matter, as such, would not have fallen within a reserved matter under schedule 5 of the Scotland Act 1998 e.g. agriculture, fisheries, environmental protection etc.

11.5 There are a number of alternative options in addition to the one in the bill for dealing with the complexities of retained EU law and the competence of the devolved jurisdictions. This is an area of political debate and we offer these options for consideration without endorsing any particular one:

11.6(a) Adopt the provisions in the bill on a transitional basis only and subject to a specific cut-off date. At the expiry of the transitional period, powers in devolved areas would revert to the devolved legislatures, unless specific alternatives had been put in place. This would allow the UK Government the opportunity to work out what has to be done in light of the UK’s future relationship with the EU, but acknowledge that the devolved legislatures will obtain the additional powers within a defined timescale.

11.6(b) Repeal the EU law constraint leaving EU competences to fall as determined by schedule 5, and any new common frameworks to be established by agreement between the UK Government and the devolved administrations.

11.6(c) Replace the cross-cutting EU constraint with new cross-cutting constraints, for example to protect the UK single market and/or to comply with international obligations. These might be more or less extensive than the EU law constraint in practice, but would have the benefit of (a) an underpinning principle and (b) catering for unforeseen cases.

11.6(d) Repeal the EU law constraint and amend schedule 5 to re-reserve specific competences to the UK level to enable UK Government to establish common frameworks.

Clause 12 - Financial Provision

We have no comment to make.

Clause 13 - Publication and Rules of Evidence

We agree with the terms of Schedule 5, Paragraph 1 that the Queen's Printer must make arrangements for the publication of each relevant instrument that has been published before exit day by an EU entity and a relevant international agreement and the decisions of the European Court or any other document published by European entity.

In our response to the White Paper *Legislating for the United Kingdom's withdrawal from the European Union* we had recommended that once the process of identifying EU derived UK law is complete that body of law should be collected in an easily identifiable and accessible collection. We believe that Schedule 5 Paragraph 1 is a significant step forward in this direction and will be of significant assistance to those to whom this body of law will apply and to their advisers.

In connection with Schedule 5, Part 2, containing the Rules of Evidence, we agree with paragraph 3 that it is important that where it is necessary in legal proceedings to decide a question as to the meaning or effect in EU law of any of the EU treaties or any other treaty relating to the EU, or the validity, meaning or effect in EU law of any EU instrument, that question will be treated as a question of law rather than as a question of fact. This is a sensible provision which will save time and money and the expenses of clients in litigation concerning the EU or the validity or meaning of EU instruments.

We question whether it is necessary to simply empower Ministers of the Crown by regulations to make provision enabling or requiring judicial knowledge to be taken of the relevant matter as stated in Paragraph 4 of Schedule 5, it would appear to be unnecessary to make this provision which could easily be made in the Statute itself.

Clause 14 - Interpretation

We have no comment to make.

Clause 15 – Index of Defined Expressions

We have no comment to make.

Clause 16 - Regulation

We have no comment on this clause but we have comments upon Schedule 7 below.

Clause 17 - Consequential and Transitional Provisions

We have the following comments to make:

- 1) The powers given to Ministers under clause 17(1) to make “such provision as the Minister considers appropriate in consequence of this Act” are very wide and apply to any legislation passed before the EU (Withdrawal) bill is passed. This clause requires amendment to restrain such sweeping powers.

The only options for the procedure to which the orders under this clause will be subject are either affirmative procedure to which the orders under this clause will be subject or negative procedure. This approach restrains Parliament in exercising adequate scrutiny over the orders concerned. The need for scrutiny should not be sacrificed to the need for speed.

We recommend adoption of the procedures similar to the Legislative and Regulatory Reform Act 2006, which include communication and the possibility of super affirmative procedure.

- 2) The same comments apply to parts 3 and 4 of schedule 8.

Clause 18 - Extent

We have no comments to make other than to note that the position of the Channel Islands and the Isle of Man is not reflected in this bill nor are other overseas territories.

Clause 19 - Commencement and Short Title

We have no comment to make.

Schedule 1 - Further Provision about Exception to Saving and Incorporation

Schedule 1, paragraph 1(3) provides that Regulations may provide for a challenge which would otherwise have been against an EU institution to be against a public authority in the UK. We believe that provision for such challenges should, for clarity's sake be on the face of the bill.

Schedule 1, paragraph 3(1) Would not allow any challenge to be made on and after exit day, or allow any court to quash, any enactment or rule of law on the grounds that it does not comply with the general principles of EU law. In view of our comments upon the effect of this provision in paragraphs 5.7 and 11.4 above, it would be helpful if the Government could explain and clarify

- i. what are the reasons for this provision;
- ii. whether provision is intended to apply to any pre-exit enactment and, if so, whether this provision would prevent any challenge being made to any pre-exit ASP on the grounds that it is outwith the legislative competence of the Scottish Parliament because it is incompatible with those general principles but not on the grounds that it is incompatible with any other pre-exit EU law.

Schedule 2 - Corresponding Powers Involving Devolved Authorities

Parts 1,2 and 3 of Schedule 2 confers upon a devolved authority similar powers to make regulations as are conferred upon a Minister of the Crown by clauses 7, 8 and 9.

Schedule 2 applies to all the devolved jurisdictions but for the purposes of this Briefing, we will concentrate upon the position under Part 1 of Schedule 2 in Scotland though similar comments apply in relation to the other Parts.

Comment

The power to deal with deficiencies under Part 1 of Schedule 2

Scope of the power

- 2.1 Paragraph 1(1) of Schedule 2 confers upon Scottish Ministers powers, by regulations to make such provision as they think appropriate “to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively or (b) any other deficiency in the retained EU law arising from the withdrawal of the UK from the EU”. They are similar to the powers conferred upon a Minister of the Crown by clause 7(1) but this does not mean that they are not quite extensive, particularly as extended by paragraph 1(3) which applies clauses 7(2)-(8).
- 2.2 Clause 7 (2), as applied by paragraph 1(3), gives examples of the kind of deficiencies which the regulations are intended to deal with. The examples given are obvious and give the impression that the regulation making power is necessary, quite limited and reasonable. However, the examples of deficiencies specified in clause 7(2) are not exhaustive and do not limit the deficiencies which could be dealt with in regulations There could be various views taken as to, and many arguments over what constitutes a failure in the retained EU law to operate effectively or any other deficiency in that law arising from brexit. And those deficiencies are not limited to those of the same kind as those specified in clause 7(2).
- 2.3 In addition, there is no real limit upon what the regulations can provide “to prevent, remedy or mitigate” such deficiencies. This is because the regulations may make provision for whatever the Scottish Ministers consider appropriate to do so. This could be quite far ranging.
- 2.4 In these circumstances, we agree with the approach taken by the House of Lords Select Committee on the Constitution, in its Report on “The Great Repeal bill and Delegated Powers” (9th Report, Session

2016-17). They suggested and have recently reinforced their concerns about the delegated powers provisions that the scope of the powers should be limited in such a way that they could only be used “so far as necessary to adapt the body of EU law to fit the UK’s domestic legal framework”. It is suggested that this might be done by restricting

- the deficiencies which might be dealt with by the regulations to those of the same kind as those specified in clause 7(2); and
- what provision might be made by the regulations to what is necessary in order to ensure that the retained EU law can operate effectively in domestic law.

2.5 It is also suggested in the comments upon Schedule 7 below that the parliamentary procedure for dealing with these regulations should be amended.

Joint regulation making power

3.1 Paragraph 1(2) confers similar powers as in paragraph 1(1) upon Scottish Ministers acting jointly with a Minister of the Crown. However, it is not clear what are the circumstances in which Scottish Ministers have to make the regulations jointly with a Minister of the Crown.

3.2 Paragraph 7(1) requires such regulations to be made jointly where they contain provision which could be made by regulations otherwise than under the Bill which would require to be made jointly. It is not known whether there are any such examples of regulations and, if not, it is doubted whether this provision is required. It is suggested that further clarification should be sought as to why paragraph 7(1) is required.

3.3 Apart from paragraph 7(1), the only circumstance in which it may be thought that the regulations should be made jointly are if they relate to matters which would otherwise be outside devolved competence. This raises the question as to why it should be necessary for Scottish Ministers to make regulations in these circumstances. However, if it is necessary and if this is the only circumstance in which the regulations have to be made jointly, it is suggested that, in the interests of clarity, this should be expressly stated.

Ancillary provisions

4.1 Paragraph 1(3) applies clauses 7(2) – (8) which contain ancillary provisions about the regulation making powers. In particular, it would apply clause 7(7) which provides that no regulations may be made after the end of a period of 2 years beginning with exit day

4.2 However it also applies clause 7(4) which would enable Scottish Ministers in the regulations to make any provision which could be made by Act of Parliament. This is the Henry VIII provision. However this is subject to paragraph 1(4)

- 4.3 Paragraph 1(4)(b) provides that the regulations cannot confer a power to legislate (other than rules of court procedure). There is no such restriction in clause 7. It is thought that there may be circumstances in which it might be necessary for Scottish Ministers in regulations to empower themselves to make further regulations. There is nothing which would prevent them an ASP from enabling Scottish Ministers to do so at present and there is no explanation as to why Scottish Ministers should be prevented from doing so in this case. It is therefore suggested that paragraph 1(4)(b) should be deleted.
- 4.4 Paragraph 1(4)(a) provides that any regulations made by Scottish Ministers are subject to paragraphs 2 to 8.
- 4.5 Paragraph 2 requires any regulations be within “devolved competence” as that expression is defined in paragraph 9. But there is already a definition of “devolved competence” in s. 126(1) of the Scotland Act where it is provided that, when used in connection with the exercise of functions, it is to be construed in accordance with s. 54 of the Scotland Act. It is not clear why this expression is given a different meaning in this context and, in particular, why paragraph 9(1)(a) provides that the requirement to comply with EU law or not to modify retained EU law should be ignored – and particularly when regard is had to paragraph 3.
- 4.6 Paragraph 3 prohibits any regulations being made which modifies any retained direct EU legislation (eg an EU regulation) or anything which is retained EU law by virtue of clause 4 (eg rights under s. 2(1) of ECA) or which is inconsistent with any modification made by the Bill or in regulations by a Minister of the Crown of any such legislation or law. This is a very puzzling provision because it would appear to prevent Scottish Ministers from making regulations to deal with deficiencies in such retained EU law even where it would otherwise have been within devolved competence. This would appear to undermine at least part of the purpose why Scottish Ministers are being given the power to deal with such deficiencies in paragraph 1(1). It is therefore suggested that further clarification is sought as to what is the purpose of this provision.

Requirement to consult or obtain consent of a Minister of the Crown

- 5.1 Paragraphs 5 and 6 (4) require the regulations to be subject to the consent of a Minister of the Crown in certain circumstances. It is not clear why it is necessary to impose such a requirement. In particular, paragraph 6(4)(b) requires such consent to be obtained in the case of regulations where they contain provision which could be made by regulations otherwise than under the Bill by Scottish Ministers or by the First Minister or the Lord Advocate acting alone where such consent is required. It is not known whether there are any such examples of regulations and, if not, it is doubted whether this provision is required. It is suggested that further clarification should be sought as to why paragraph 5 or 6(4) is required.
- 5.2 Paragraph 8(2) requires the regulations to be made only after consultation with a Minister of the Crown where they contain provision which could be made by regulations otherwise than under the Bill which would require such consultation. It is not known whether there are any such examples of regulations

and, if not, it is doubted whether this provision is required. It is suggested that further clarification should be sought as to why paragraph 8(2) is required

The power to comply with international obligations under Part 2 of Schedule 2

6.1 Paragraph 13(1) confers upon Scottish Ministers powers, by regulations to make such provision as they think appropriate *“to prevent or remedy any breach, arising from the withdrawal of the United Kingdom from the EU, of the international obligations of the United Kingdom.”*

6.2 Similar comments as are made above may be made in relation to -

- Paragraph 13(2) and 17 about the joint regulation making power – see paragraph 3.1-3.3;
- Paragraph 13(4)(d) about the prohibition on conferring a power to legislate – see paragraph 4.3;
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- Paragraph 14 about legislating within devolved competence – see paragraph 4.5 but, in this case, there is yet again a different definition of devolved competence in paragraph 18;
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- Paragraph 15 about the prohibition on modifying retained direct EU legislation etc. – see paragraph 4.6;
- Paragraph 17 about the requirement for consent, joint exercise or consultation with a Minister of the Crown – see paragraphs 3.2, 5.1 and 5.2

Power to implement the withdrawal agreement in Part 3 of Schedule 2

7.1 Paragraph 21(1) confers upon Scottish Ministers powers, by regulations to make such provision as they think appropriate *“for the purposes of implementing the withdrawal agreement if the [they] consider[s] that such provision should be in force on or before exit day”*.

7.2 This is a very wide power because it is not known what will be in the Withdrawal Agreement, what will be required to implement it and what provision requires to be in force on or before exit day. We suggest that the scope should be expressly restricted to doing only what is necessary for such implementation.

7.3 We also suggest in the comments on Schedule 7 that some of these regulations should be subject to super affirmative procedure.

7.4 Similar comments as are made above may be made in relation to -

- Paragraph 21(2) about the joint regulation making power – see paragraph 3.1-3.3;
- Paragraph 21(4)(d) about the prohibition on conferring a power to legislate – see paragraph 4.3.

- Paragraph 22 about legislating within devolved competence – see paragraph 4.5 but, in this case, the definition of devolved competence is that in paragraph 18;
- Paragraph 23 about the prohibition on modifying retained direct EU legislation etc. – see paragraph 4.6;
- Paragraph 26 about the requirement for consent, joint exercise or consultation with a Minister of the Crown – see paragraphs 3.2, 5.1 and 5.2”

Schedule 3 - Further Amendments of Devolution Legislation

Part 1 of Schedule 3 makes amendments to the devolution legislation relating to executive competence as clause 11 does in relation to legislative competence. Similar comments apply to these provisions as are made in relation to clause 11 above.

Part 2 makes a number of miscellaneous amendments to the devolution legislation.

Schedule 4 - Powers in Connection with Fees and Charges

The power to change fees appears to be very wide. At the very least the exercise of these powers should be subject to prior consultation.

Schedule 5 - Publication and Rules of Evidence

See our comments on clause 13.

Schedule 6 - Instruments which are Exempt EU Instruments

We have no comments to make.

Schedule 7- Regulations

Schedule 7 makes provision for the scrutiny by Parliament and the devolved legislatures of regulations made under the Act and other general provisions about such regulations.

Part 1 contains provisions relating to the scrutiny of the regulation making powers to remedy deficiencies.

Paragraph 1(1) provides that regulations by a Minister of the Crown under clause 7 which contain provisions falling within paragraph 1(2) are to be subject to draft affirmative resolution procedure and other regulations are subject to negative procedure in the UK Parliament. Paragraph 1(4) similar provision is made for regulations made by Scottish Ministers under Part 1 of Schedule 2: only those containing provisions falling within paragraph 1(2) are subject to affirmative procedure while the rest are subject to negative procedure in the Scottish Parliament.

Comment

Sch 7.1 In its Report on “the Great Repeal bill and Delegated Powers” (9th Report, Session 2016-17), the

House of Lords Select Committee on the Constitution has made and recently reiterated various recommendations about the content of the Explanatory Memorandum which accompanies each SI amending the retained EU law. For example, they recommended

- that the Minister making the regulations should sign a declaration stating that
“the instrument does no more than necessary to ensure that the relevant aspect of EU law will continue to make sense in the UK following the UK’s exit from the EU, or that it does no more than necessary to implement the [withdrawal agreement]”.
- that the Explanatory Memorandum should set out clearly what the pre-exit EU did, what effect the amendments will have on the retained EU law on and after exit day and why the amendments were considered necessary; and
- that the Minister should indicate in its Memorandum what level of scrutiny the Minister considered appropriate for each instrument.

We consider that it would be helpful if these recommendations were given effect to in the bill or, if not, if the Government could give commitments to comply with them. We also consider that these recommendations should also be followed by Scottish Ministers when they make regulations under Part 1 of Schedule 2.

Sch 7.2 The House of Lords Committee considered that a parliamentary committee should consider, and decide, what level of scrutiny was appropriate for each instrument and that an instrument which “amends EU law in a manner that determines matters of significant policy interest or principle should undergo a strengthened scrutiny procedure”. They did not, however, define what this strengthened scrutiny procedure should be but they did recognise that “existing models for strengthened scrutiny can prove resource intensive and time consuming” However they thought an essential element of any strengthened scrutiny procedure should provide an opportunity for the instrument to be revised in the light of the parliamentary debate.

Sch 7.3 We appreciate that it may not be practical, or there may not be sufficient time, to allow a parliamentary committee to determine what scrutiny each instrument should be subject to. However it is considered

- i. that the Committee were correct to suggest that there should be a strengthened scrutiny procedure for certain instruments which met certain criteria;
- ii. that the procedure should provide an opportunity for the instrument to be revised by the Minister in the light of the parliamentary debate;
- iii. that the existing criteria in paragraph 1(2) of Schedule 7 are too narrowly drawn and that they should be expanded to contain something along the lines of what the Committee suggested; and

- iv. that the Minister should have to explain in the Explanatory Memorandum what were the reasons for considering that the level of scrutiny chosen was appropriate and that there should be an opportunity for the Parliament to determine that the level of scrutiny chosen by the Government was not appropriate in any particular case.

We also consider that these suggestions should also be followed in relation to any regulations made by Scottish Ministers under Part 1 of Schedule 2.

Schedule 7.4 we also suggest

- it should be possible for a Minister of the Crown (and in the case of Scottish regulations, Scottish Ministers) to determine, in any particular case, that the regulations should be subject to super affirmative procedure;
- the appropriate parliamentary committee in the Westminster Parliament to scrutinise and determine whether the level of scrutiny chosen by a Minister of the Crown was or was not appropriate should be the JCSI (and in the case of Scottish regulations, the appropriate committee should be the Scottish Parliament's Delegated Powers and Law Reform Committee).
- if in any particular case, that JCSI (or the Scottish committee) consider that the level of scrutiny chosen by a Minister of the Crown was not appropriate, they should be able to determine what the level of scrutiny should be, including, if it is thought necessary, super affirmative procedure;

Scrutiny procedure in certain urgent cases

Schedule 7.6 The scrutiny procedure in "urgent cases" (schedule 7 paragraph 3 page 11) allows a Minister to make regulations without a draft being put to each House simply on the basis of a declaration of urgency. It would be helpful if there were further explanation of when these powers might be used.

There also does not appear to be any corresponding provision in the case of regulations made by Scottish Ministers in urgent cases. There is no explanation as to why there is no such provision. It is suggested that there should be.

Scrutiny of powers to implement international obligations

Schedule 7.7. Paragraph 5 of Schedule 7 makes provision for the scrutiny of regulations made by a Minister of the Crown under section 8. Paragraph 5(4) makes similar provision in relation to regulations made by Scottish Ministers under Part 2 of Schedule 2.

Schedule 7.8 We suggest that there should be similar provisions as suggested above in relation to regulations made under section 7 or Part 1 of Schedule 2.

Scrutiny of powers to implement the withdrawal agreement

Schedule 7.9 Paragraph 6 of Schedule 7 makes provision for the regulations made by a Minister of the Crown under section 9 to be subject to draft affirmative procedure. Paragraph 6(4) makes similar provision for regulations made by Scottish Ministers under Part 3 of Schedule 2 to be subject to affirmative procedure.

Schedule 7.10 In view of the open ended nature of the powers to implement the withdrawal agreement, it is suggested that this is not sufficient and that the Westminster Parliament and the Scottish Parliament should be given the opportunity to revise the draft instrument.

Accordingly, we suggest that, in all cases, the procedure for dealing with such cases should be super affirmative.

We take the view that the scrutiny of subordinate legislation under the bill needs to be improved so that MP's and Peers can adequately review the orders before they become law.

Schedule 8 - Consequential, Transitional, Transitory and Saving Provisions

See our comments on clause 17.

Schedule 9 - Additional Repeals

No comment.



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