

European Union (Withdrawal) Bill
Amendment to be moved on Report

Clause 5, page 3, line 23 Leave out Subsections (4) and (5).

Effect

This amendment deletes the Subsections which remove the Charter of Fundamental Rights from domestic law.

Reason

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.

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. 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.

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.

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Clause 6, page 3, line 36 add at end

“other than a matter referred to in paragraph 38 of the joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of the negotiations under Article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union dated 8 December 2017”.

Effect

This amendment ensures that UK Courts and Tribunals can refer matters to the CJEU as agreed between the EU/UK negotiators in December 2017.

Reason

The joint negotiators’ report confirms that the CJEU will jurisdiction over referrals from UK Courts and Tribunals regarding citizens’ rights (paragraph 38).

“...the Agreement establishes rights for citizens following on from those established in Union law during the UK’s membership of the European Union; the CJEU is the ultimate arbiter of the interpretation of Union law. In the context of the application or interpretation of those rights, UK courts shall therefore have due regard to relevant decisions of the CJEU after the specified date. The Agreement should also establish a mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, to ask the CJEU questions of interpretation of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to be able to give judgment in a case before it. This mechanism should be available for UK courts or tribunals for litigation brought within 8 years from the date of application of the citizens’ rights Part”.

It is important that this agreement is reflected in the bill. This amendment will achieve that objective.

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Clause 6, page 3, line 37 leave out Subsection (2) and insert –
“(2) A court or tribunal may regard the decisions of the European Court made on or after exit day to be persuasive”.

This amendment enables UK Courts and Tribunals to consider the decisions of the European Court to be persuasive.

Effect

This amendment enables UK Courts and Tribunals to consider the decisions of the European Court to be persuasive.

Reason

We believe that Clause 6 should be made clearer. Lord Neuberger, the former president of the UK Supreme Court, in an interview with the BBC, said that "If [the Government] doesn't express clearly what the judges should do about decisions of the European Court of Justice after Brexit, or indeed any other topic after Brexit, then the judges will simply have to do their best." It would be "unfair", he said, "to blame judges for making the law when Parliament has failed to do so". The judiciary would "hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell it out in a statute". Lord Neuberger seemed to focus on Clause 6(2), as this is the Clause on which the status of future ECJ case law depends.

Clause 6(2) leaves much to judicial discretion. Clause 6 (2) states: "A court or tribunal need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so".

We believe that it would provide better guidance for the courts were they to be allowed to consider CJEU decisions as persuasive.

That is because 'persuasive authority' is a recognised aspect of the doctrine of stare decisis or precedent. Persuasive decisions are not technically binding but the courts can pay special attention to them. Legal sources that currently have persuasive authority include:

- (a) Decisions of the Judicial Committee of the Privy Council.
- (b) Decisions of higher level foreign courts especially in Commonwealth and other similar jurisdictions;
- (c) Decisions of the European Court of Human Rights which under the Human Rights Act 1998 must be taken into account by a UK court.

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Amendment to be moved on Report

Clause 7, page 5, line 7 Leave out “appropriate” and insert “necessary”.

Effect

This amendment ensures that Ministers can only bring forward regulations under Clause 7 when it is necessary to do so.

Reason

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.

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...

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.

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.

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

- A. 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.
- B. 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 Government should consider limiting these powers by amending the bill in line with the suggestions by the House of Lords Select Committee, such as to doing what is necessary to ensure that the retained EU law can operate in the domestic law.

The issues raised by this amendment have been referred to by the Scottish Parliament’s Finance and Constitution Committee interim report on the European Union (Withdrawal) bill LCM (1st Report, 2018 (session 5). The Committee supports the recommendation of the Delegated Powers and Law Reform Committee that the power in clause 7 “should only be available where Ministers can show that it is necessary to make a change to the statute book” (paragraph 119).

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Clause 8, page 6, line 33
insert “necessary”.

Leave out “appropriate” and

Effect

Consequential amendment.

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Clause 9, page 7, line 3.
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

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Clause 17, page 14, line 15.
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

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Clause 17, page 14, line 22
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill

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Schedule 2, page 17, line 13
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill
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Schedule 2, page 17, line 18
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill
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Schedule 2, page 22, line 39
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill
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Schedule 2, page 22, line 43
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill
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Schedule 2, page 25, line 12
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

European Union (Withdrawal) Bill
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Schedule 2, page 25, line 16
“necessary”.

Leave out “appropriate” and insert

Effect

Consequential amendment.

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Schedule 7, page 40, line 14 after “unless” insert.

“(a) the Minister laying the instrument has made a declaration that the instrument does no more than necessary to prevent remedy or mitigate –

(i) any failure of retained EU Law to operate effectively, or
(ii) any other deficiency in retained EU Law arising from the withdrawal of the United Kingdom from the EU; and

(b)”

Effect

This amendment requires a Ministerial declaration to be made before the regulation making power under Schedule 7 is involved.

Reason

In its Report on “The Great Repeal bill and Delegated Powers” (9 Report, Session 2016-17), the House of Lords Select Committee on the Constitution made various recommendations about the content of the Explanatory Memorandum which accompanies each Statutory Instrument amending 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 Law 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.