



Law Society
of Scotland

Briefing on the European Union (Withdrawal Agreement) Bill Second Reading in the House of Commons October 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 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 comment on the European Union (Withdrawal Agreement) bill (WAB) which implements the Withdrawal Agreement (WA) between the United Kingdom and the European Union. The Sub Committee has the following comments to put forward for consideration.

General Comments

Leaving the European Union is arguably the most important constitutional issue confronted by the United Kingdom Parliament since the UK joined the European Economic Community.

The revised WA and Political Declaration (PD) were considered and agreed at the European Council on 17 October 2019.

The revised WA sets out the terms of the UK's exit from the EU and European Atomic Energy Community, with changes to the Northern Ireland Protocol to remove the backstop and replace it with arrangements that meet the UK Government's objectives.

The new PD sets out the framework for the future relationship between the EU and the UK including an agreement on trade and economic cooperation with the EU alongside agreements on security and other areas of cooperation.

These documents were laid in Parliament on 19 October ahead of the vote in the House of Commons on the deal and consideration in the House of Lords.

A statement that political agreement has been reached was also laid in Parliament on 19 October — the laying of these documents complies with the terms of the European Union (Withdrawal) Act 2018 (EUWA) section 13(1)(a)(i), (ii) and (iii) which clause 32 of the WAB will repeal.

However, we have concerns that scrutiny of this legislation and the WA is disproportionately inadequate considering the importance of the complex issues which require careful consideration and which are contained in these documents.

Assuming the Second Reading is agreed to today, this will be followed by Committee tonight and Wednesday with Report and Third reading on Thursday. Lords proceedings would take place later this week or next week.

There is a considerable risk that on this prospective timetable scrutiny is being sacrificed for speed and experience teaches that legislation made in haste may not meet the tests of good law identified

by the Office of Parliamentary Counsel as being law that is necessary, clear, coherent, effective and accessible.

We note that approval in terms of clause 33 of the WAB under the Constitutional Reform and Governance Act 2011 does not apply which restricts the proper processes of scrutiny even further. Repealing section 13 of the EUWA by clause 32 of the WAB removes further requirements for scrutiny and approval of the WA and related documents.

Part 1: Implementation

Under the UK's constitutional arrangements the Government is the body which, in exercise of the Royal prerogative negotiates, signs and ratifies treaties to which the UK wishes to accede. Our system is a dualist system and Parliament has the role to ensure that the treaties to which the UK has agreed are then implemented and given the force of law. It is intended that the WAB will fulfil the implementation of the revised WA.

The EUWA Section 1 provides that the European Communities Act 1972 (ECA) will be repealed on exit day, 31 October 2019 at 11pm and seeks to ensure that EU law as then applies in the UK will be converted into UK law as retained EU law.

The WAB will seek to give effect to the WA in UK law. The WA provides in Articles 126 and 127 for a transition or implementation period during which subject to certain exceptions EU law will continue to apply until 31 December 2020 at 11pm.

The WAB clause 1 proposes to implement these provisions through amending the EUWA by saving the effect of ECA for the transition or implementation period. In other words, the WAB will preserve the effect of the ECA during the transition or implementation period and ensure that its effect comes to an end on 31 December 2020 at 11pm (called IP Completion day under clause 37 of the WAB).

This means:

- that the relevant provisions of EU law will continue to have effect in domestic law and be supreme over Acts of the UK Parliament until IP completion day;
- that the UK will remain bound to implement any new non-directly effective EU law (EU derived legislation) during the transition or implementation period and even although it may be scrutinised by the UK Parliament or by the Devolved Legislatures the UK will not necessarily have had any part to play in its making because it will no longer be a member of the EU;
- that the WAB amends the EUWA so that the conversion of EU law into "retained EU law"...will take place on 31 December 2020 and not on 29 March 2019. Accordingly, the Bill extends the regulation amending powers contained in the EUWA to 2 years after the end of the implementation or transition period, that is until 31 December 2022 (clause 3 (EUWA new section 8(4)).
- The Statutory Instruments and Scottish Statutory Instruments which have been drafted to take effect on 31 October 2019 will also need to be extended to take account of EU law as it exists on 31 December 2020.

The WAB does not take place in isolation from other aspects of the Withdrawal. These include:

1. The approval of the WA by the European Parliament and Council under Article 50.
2. Where aspects of the WAB engage with the Sewel or Legislative Consent Convention the consent of the Devolved Legislatures in Scotland, Wales and Northern Ireland – this has particular relevance to the powers of devolved authorities in Schedule 1 and clauses 12, 13 and 14.
3. Compliance with the European Charter of Fundamental Rights and the Human Rights Act 1998.
4. The need for consultation with stakeholders throughout the UK.

We have proposed since the referendum that a Whole of Governance approach should be adopted by the Government when proposing legislative or policy changes in connection with the UK's withdrawal from the EU. We reiterate that this is the best way to achieve legislation which is workable, practical and will achieve its objectives. We regret that, apart from the White Paper, there has been no widespread consultation on the exact terms of the WAB.

Part 2: Remaining implementation of remainder of withdrawal agreement

Our Comments

Section 5 General Implementation of remainder of withdrawal agreement

We consider that clause 5 will effectively implement the remainder of the WA. We welcome the provisions of new section 7A(5) which is a useful guide to tie in the WAB to the WA.

Section 6 General Implementation of related EEA EFTA and Swiss Agreements

We consider that clause 6 will effectively implement the related EEA EFTA and Swiss Agreements. We welcome the provisions of new section 7B(4) which is a useful guide to tie in the WAB to the related EEA EFTA and Swiss Agreements.

Participation in EU institutions, agencies and bodies

Our Comments

We note that the UK and the EU have agreed that representatives or experts from the UK will be able to continue to attend certain Commission-led EU meetings, and meetings of EU entities where the presence of the UK is necessary and is in the interests of the Union, or where the discussion concerns acts addressed to the UK and its citizens. We expect that the UK Government will continue the operation of the Memorandum of Understanding between the it and the Devolved administrations and the Concordat on the Coordination of European Union Policy regarding the devolved administrations (WA Article 128.5).

Article 129.4 International agreements, trade negotiations and external representation

Our Comments

Consideration should be given for provision in the WAB specifically for international agreements to which the UK is a party as a result of or relevant to its membership of the EU.

Under Article 6 provides that subject to certain exception the term “Member State” includes the UK.

And the recitals to the WA confirm that the UK is to be subject to EU law – including international agreements during the transition period.

The UK has obligations concerning the EU's external action. During the transition or implementation period the UK is bound by ‘the obligations stemming from the international agreements concluded by the Union, or by the Member States acting on its behalf, or by the Union and its Member States acting jointly’(Article 129(1)). For its part, the EU ‘will notify the other parties to these agreements that during the transition period the United Kingdom is to be treated as a Member State for the purposes of these agreements’ and, if need be, inform other parties of any extension of the transition period (footnotes to Article 129(1) and 132(1)).

We also think it is necessary for the Government to detail:-

- (a) how this notification process will work and
- (b) all the agreements which will be legislated for in the WAB. These agreements should be listed in a comprehensive schedule.

Part 3: Citizens’ rights

Our Comments

The WAB gives effect in UK law to part 2 of the WA which covers:-

- a. rights related to residence articles 16-18 section 7 ;
- b. equal treatment rights of workers etc; article 12,23,24 section 14;
- c. recognition of professional qualifications Chapter 3 of Title II article 27-29 section 12;
- d. coordination of social security systems article 30-36 section 13 and
- e. monitoring authority section 15

Equal treatment

Our Comments

We agree with the approach being taken by the UK Government. We note that in paragraph 35 the White Paper states “The UK already provides significant equal treatment protections. The Bill may include additional provisions required for those in scope of the WA. These changes are likely to be technical in nature”. It would be helpful to know what changes may be in contemplation.

Section 12 : Mutual recognition of professional qualifications

Our Comments

We note the terms of clause 12 concerning the recognition of professional qualifications

The White Paper noted that “it will be for the EU and its Member States to implement these arrangements as they relate to UK citizens living in the EU and they must do so in conformity with the Withdrawal Agreement” [paragraph 38].

It is in our view highly important that those reciprocal rights are implemented in the EU27 specifically as we have detailed them in previous responses to Withdrawal documents. We believe that the focus on citizens’ rights was the correct approach to take in connection with the WA. However providing citizens with rights without providing them with the capability to obtain legal advice may render these rights useless. That is why we believe that it is important that citizens have proper access to their lawyers so they can obtain advice about the enforcement of the rights which are recognised in the WA.

Section 13: Coordination of social security systems

Our Comments

We have no comments to make.

Joint Committee

Our Comments

We note that the appointment of members of the UK representation on the Joint Committee (Article 164). We believe that the Joint Committee UK representatives should reflect all the jurisdictions in the UK. The WAB should provide detail on the remit, powers and accountability of the Joint Committee.

Part 4: Other separation issues

Part 4: sections 18 and 19

Our Comments

We note that the implementation or transition period will last from 31 October 2019 at 11pm until 31 December 2020 (at 11pm GMT). This seems an unduly short period of time for the negotiation of the future relationship. We note that Article 132 provides, “Notwithstanding Article 126, the Joint Committee may, before 1 July 2020, adopt a single decision extending the transition period for up to 1 or 2 years”. We take the view that the Government should indicate now whether this option will be applied.

For further information, please contact:

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