

UNITED KINGDOM INTERNAL MARKET BILL

AMENDMENT TO BE MOVED ON REPORT

Clause 3, page 3, line 27 leave out subsection (9) and insert '(9) Regulations under subsection (8) are subject to super-affirmative resolution procedure (see Schedule (*Super-affirmative resolution procedure*)).'

Effect

This amendment ensures that regulations under clause 3, subsection (8) are subject to super-affirmative resolution procedure and introduces the supportive schedule in respect of super-affirmative resolution procedure.

We remain concerned at the level of Parliamentary scrutiny applicable to regulations under clause 3 which is currently by affirmative resolution procedure.

Changing the scope of the mutual recognition principle may have significant consequences and we believe that the appropriate procedure should be super-affirmative resolution procedure which enables longer consultation and for the views of stakeholders to be taken into account. Erskine May at paragraph 31.14 describes the super-affirmative procedure as having 'been implemented in enactments where an exceptionally high degree of scrutiny is thought appropriate, for instance, for the scrutiny of certain items of delegated legislation made, or proposed to be made, under 'Henry VIII' powers'. The super-affirmative procedure provides both Houses with opportunities to comment on proposals for secondary legislation and to recommend amendments before orders for affirmative approval are brought forward in their final form. This is a bill *of profound constitutional significance* and the Constitution Committee Report paragraph 4 indicated that that we need "as much scrutiny of the Executive as possible". Deploying this procedure will achieve a better outcome than simply keeping with the bill and the usual affirmative procedure.

There was a a good debate in committee on the earlier manifestation of this amendment. Lord Thomas summed up his objection to Baroness McIntosh's amendment when he said he could not "support the precise method" adopted.

There may be many approaches to super-affirmative resolution procedure but the schedule which accompanies this amendment contains a detailed procedure.

Lord Thomas also noted:

"If a Minister wishes to exercise his powers under the Bill, there is no requirement under the noble Baroness's proposed schedule that scrutiny of his proposed amendment to primary legislation should in any way involve the devolved Administrations; no mechanism is proposed. It is true that, in paragraph 5, the Secretary of State must have regard to "representations", but there is no indication from whom the representations would or should come.

Since the Minister's powers undoubtedly include the possibility that his proposals would at the very least impinge on the devolution settlement, I would be more supportive of this proposal if it required as part of the super-affirmative procedure that, in the periods of 30, 40 or 60 days during which the proposals would be looked at in Westminster, there were a requirement that the devolved Administrations should at the very least be consulted, preferably that their consent to the proposals should be a necessary prerequisite. It is not enough that the Minister should "have regard to representations".

The schedule now provides that there is a requirement to receive representations from and to consult with the devolved administrations. We have also proposed a new clause which will deal with cases of urgency when regulations need to be presented.

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Clause 5, page 4, page 29

after “part” insert “only”

Effect

This amendment clarifies the meaning of clause 5 (3) regarding the effect of a statutory requirement under clause 6.

Reason

The effect of clause 5(3) will be to render a discriminatory statutory provision in UK or devolved legislation of “no effect”.

In committee we had reservations about the meaning of “no effect” because it lacked clarity. Lord Callanan confirmed in debate that clause 5(3) will “operate so that any future requirements that fall within the scope of the non-discrimination principle will be of no effect to the extent that they are discriminatory. For the benefit of the lawyers, this does not mean that the requirement is to be treated as if it never had any legal effect. Rather, it allows the continued operation of the requirement, except to the extent that it has discriminatory effects”. The amendment therefore seeks to emphasise that the lack of effect *only* relates to the discriminatory element of the statutory requirement and does not otherwise affect the validity of the requirement.

We were also concerned about the application of clause 5(3) to a statutory provision in an Act of Parliament. Lord Callanan confirmed that “As the Bill deals with trade across the whole of the United Kingdom, the intention is that this will apply to all legislation: secondary legislation, primary legislation passed by devolved legislatures and legislation passed by the UK Parliament”.

Under clause 55 “legislation” means inter alia “primary legislation” which includes an Act of Parliament and therefore we note that this provision means such an Act will be of “no effect” to the extent it is discriminatory under the bill.

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Clause 6, page 5, line 29

add at end “() The Secretary of State must publish the results of the consultation and give reasons for any decision reached”

Effect

This amendment requires the Secretary of State to publish the results of the consultation and give reasons for any decision reached.

Reason

The obligation on the Secretary of State to consult with the Devolved Administrations is welcome but the clause lacks any obligation on the Secretary of State to report the outcome of the consultation with reasons for the decision. The Government should make public the outcome of the consultation in the interests of transparency.

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Clause 6, page 5, line 25

leave out subsection (6) and insert '() Regulations under subsection (5) are subject to super-affirmative resolution procedure (see Schedule (*Super-affirmative resolution procedure*)).'

Effect

This amendment ensures that regulations under clause 6 will be subject to super affirmative procedure. This amendment also introduces the supportive schedule in respect of super-affirmative resolution procedure.

Reason

See the reason provided for the similar amendment at clause 3.

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Clause 8, page 7, line 4 add at end

‘ () Before making regulations under subsection (7) the Secretary of State must consult the Scottish Ministers, The Welsh Ministers and the Department for the Economy in Northern Ireland.’

Effect

This amendment ensures that the Secretary of State must consult with the Devolved Administrations before amending the list of legitimate aims.

Reason

Clause 8(7) empowers the Secretary of State to amend (by adding to varying or removing a legitimate aim) clause 8(6). This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 8 adopts a different approach to the earlier clauses in this respect

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Clause 8, page 7, line 4

add at end '() The Secretary of State must publish the results of the consultation and gives reasons for any decision reached.'

Effect

This amendment ensures that the Secretary of State must publish the results of any consultation with the Devolved Administrations along with the reasons for reaching any decision on the consultation.

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Clause 8, page 7, line 3 leave out subsection (8) and insert ‘() Regulations under subsection (7) are subject to super-affirmative resolution procedure (see Schedule (*Super-affirmative resolution procedure*)).’

Effect

This amendment ensures that regulations under clause 8 will be subject to super-affirmative procedure. This amendment also introduces the supportive schedule in respect of super-affirmative resolution procedure.

Reason

See the reason provided for the similar amendment at clause 3.

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Clause 10, page 7, line 23

add at end

‘(3) Before making regulations under subsection (2) the Secretary of State must consult the Scottish Ministers, The Welsh Ministers and the Department for the Economy in Northern Ireland.’

Effect

This amendment ensures that the Secretary of State must consult with the Devolved Administrations before amending schedule 1 of the bill.

Reason

This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations. The Government should explain why clause 10 adopts a different approach to earlier clauses in this respect.

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Clause 12, page 8, line 22 add at end

‘(2) Before preparing guidance under subsection
(1) the Secretary of State must consult the Scottish
ministers, The Welsh Ministers and the
Department for the Economy in Northern Ireland.’

Effect

This amendment ensures that the Secretary of State must consult with the Devolved Administrations before preparing guidance under clause 12.

Reason

The obligation on the Secretary of State to consult with the Devolved Administrations in earlier clauses was welcome but clause 12 does not include such an obligation. There seems no good reason why the same level of transparency which applies to other parts of the bill should not apply to clause 12. This amendment provides that transparency.

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Clause 12, page 8 line 31

add at end

‘(3) Before revising or withdrawing any guidance under subsection (1) the Secretary of State must consult the Scottish Ministers, The Welsh Ministers and the Department for the Economy in Northern Ireland.’

Effect

Consequential amendment.

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Clause 17, page 12, line 40

add at end

‘(3) before making regulations under subsection (2) the Secretary of State must consult the Scottish Ministers, The Welsh Ministers and the Department for the Economy in Northern Ireland.’

Effect

This amendment ensures that the Secretary of State must consult with the Devolved Administrations before amending schedule 2 of the bill.

Reason

This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations under clause 17(2). The Government should explain why clause 17 adopts a different approach to earlier clauses in this respect.

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Clause 17, page 12, line 43 leave out subsection (4).

Effect

This amendment deletes clause 17 (4) from the bill

Reasons

Clause 17(4) provides that for the first three months following part two coming into force the Secretary of State may make regulations subject to made affirmative resolution procedure.

Made affirmative procedure is a procedure for subordinate legislation, which needs to be carefully scrutinised. The House of Lords Constitution Committee, in its “Fast-track Legislation: Constitutional Implications and Safeguards” report, said:

“The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of ‘fast-track ’secondary legislation... If the made affirmative procedure is used, then the instrument is effective immediately.”

The report went on to say:

“Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI’s 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... ‘revisions were being made to the terms of the instruments down to the moment that they were made’”, and there had been “serious time pressure” in the making of the instruments”. Parliamentary counsel and the solicitors in Government Departments are expert in drawing up instruments and rarely make mistakes but policies which require speed of scrutiny require those carrying out that scrutiny to be additionally careful about the legislation they are considering.

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Clause 17, page 12, line 41 leave out subsection (3) and insert '() Regulations under subsection (2) are subject to super-affirmative resolution procedure (see Schedule (*Super-affirmative resolution procedure*)).'

Effect

This amendment ensures that regulations under clause 17 will be subject to super-affirmative procedure. This amendment also introduces the supportive schedule in respect of super-affirmative resolution procedure.

Reason

See the reason provided for the similar amendment at clause 3.

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Clause 19, Page 13, line 17 at end insert “only to the extent that it directly discriminates against the service provider.”

Effect

This amendment clarifies the meaning of clause 19(1) regarding the effect of a statutory requirement under clause 16.

Reason

The effect of clause 19(1) will be to render a discriminatory statutory provision in UK or devolved legislation of “no effect”.

We had reservations about the meaning of “no effect” because it lacked clarity. Lord Callanan stated, in debating amendments 81 and 84: “In Clause 21, a legislative requirement is one imposed “by, or by virtue of, legislation”.

“This extends beyond legislation to rules produced by bodies with powers delegated to them in respect of a particular field of regulation, and it may include licences or requirements contained therein. My noble friend’s Amendments 81 and 84 would appear to have the same effect. However, in my view, the term “of no effect” is the more appropriate to apply in respect of a licence or a non-legislative rule”.

We took note of Lord Callanan’s comments and now seek to clarify that the lack of effect *only* relates to that element of the regulatory requirement which directly (or in the case of clause 20 indirectly) discriminates against a service provider. We hope the government will accept this amendment as a helpful clarification of clause 19 (and the related amendment in clause 20).

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Clause 20, Page 13, line 35 at end insert “only to the extent that it indirectly
discriminates against the service provider

Effect

Please see the reason for the similar amendment to clause 19.

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Clause 20, page 14, line 39

at end insert

‘ () before making regulations under subsection (8) the Secretary of State must consult the Scottish Ministers, The Welsh Ministers and the Department for the Economy in Northern Ireland.’

Effect

This amendment ensures that the Secretary of State must consult with the Devolved Administrations before amending the definition of ‘legitimate aim’ in clause 20(6).

Reason

This is a very wide power and regulations are subject to affirmative resolution procedure. Unlike other order making powers earlier in the bill the Secretary of State is under no obligation to consult the Devolved Administrations before making such regulations under clause 20(8). The Government should explain why clause 20 adopts a different approach to earlier clauses in this respect.

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Clause 20, page 14, line 40 leave out subsection (9) and insert ‘() Regulations under subsection (8) are subject to super-affirmative resolution procedure (see Schedule (*Super-affirmative resolution procedure*)).’

Effect

This amendment ensures that regulations under clause 20 will be subject to super-affirmative procedure. This amendment also introduces the supportive schedule in respect of super-affirmative resolution procedure.

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New clause *Scrutiny procedure in certain urgent cases*

(1) Subsection (2) applies to a statutory instrument under this bill to which the super-affirmative resolution procedure applies,

(2) The instrument may be made without scrutiny under the super-affirmative resolution procedure if it contains a declaration that the Secretary of State is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being approved under that procedure.

(3) After an instrument is made in accordance with subsection (2), it must be laid before each House of Parliament.

(4) Regulations contained in an instrument made in accordance with subsection (2) cease to have effect at the end of the period of 28 days beginning with the day on which the instrument is made unless, during that period, the instrument is approved by a resolution of each House of Parliament.

(5) In calculating the period of 28 days, no account is to be taken of any time during which—

- (a) Parliament is dissolved or prorogued, or
- (b) either House of Parliament is adjourned for more than four days.

(6) If regulations cease to have effect as a result of sub-paragraph (4), that does not

- (a) affect the validity of anything previously done under the regulations, or
- (b) prevent the making of new regulations.

Effect

This amendment provides for a procedure to approve regulations in cases of urgency.

Reason

During the committee stage Peers raised issues concerning the length of time which the super-affirmative resolution procedure could require. This amendment has been designed to acknowledge the need for urgency in certain cases. It allows for the Secretary of State to make regulations following a declaration that by reason of urgency it is necessary to make the regulations without a draft being approved under the super-affirmative resolution procedure.

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To move the following Schedule—

Insert the following new Schedule—

“SUPER-AFFIRMATIVE RESOLUTION PROCEDURE

1 If the Secretary of State considers it appropriate to make regulations under this Act which are subject to the super-affirmative resolution procedure, the Secretary of State may lay before Parliament—

- (a) draft regulations, and
- (b) an explanatory document.

2 The explanatory document must introduce and give reasons for draft regulations.

3 Subject as follows, if after the expiry of the 40-day period the draft regulations laid under paragraph 1 are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the draft regulations.

4 The procedure in paragraphs 5 to 8 apply to the draft regulations instead of the procedure in paragraph 3 if—

- (a) either House of Parliament resolves within the 30-day period, or
- (b) a committee of either House charged with reporting on the draft regulations so recommends within the 30-day period and the House to which the recommendation is made does not by resolution reject the recommendation within that period.

5 The Secretary of State must consult the:

- (a) The Scottish Ministers
- (b) The Welsh Ministers and
- (c) The Northern Ireland Executive

And have regard to—

- (a) their representations,
- (b) any other representations received and
- (c) any resolution of either House of Parliament, and any recommendations of a committee of either House of Parliament charged with reporting on the draft regulations, made during the 60 day period on the draft regulations.

6 If, after the expiry of the 60-day period, the draft regulations are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the draft regulations.

7 If, after the expiry of the 60-day period, the Secretary of State wishes to proceed with the draft regulations but with material changes, the Secretary of State may lay before Parliament—

(a) a revised draft of the regulations, and

(b) a statement giving a summary of the changes proposed.

8 If the revised draft regulations are approved by a resolution of each House of Parliament, the Secretary of State may make regulations in the terms of the revised draft regulations.

9 For the purposes of this Schedule regulations are made in the terms of draft regulations or revised draft regulations if they contain no material changes to their provisions.

(10) In this paragraph, references to the “30-day”, “40-day” and “60-day” periods in relation to any draft regulations are to the periods of 30, 40 and 60 days beginning with the day on which the draft regulations were laid before Parliament.”