

IN THE MATTER OF THE EUROPEAN UNION (WITHDRAWAL) BILL

ADVICE

A. INTRODUCTION AND SUMMARY

1. The European Union (Withdrawal) Bill (the “**Bill**”) was considered and amended in a Committee of the whole house on 20 December 2017. The Report Stage and Third Reading in the House of Commons concluded on 17 January 2018. The House of Commons approved the third reading of the Bill (as amended by Committee) by a vote of 324 to 295. The Bill was introduced in the House of Lords on 18 January 2018.
2. Clauses 7 to 9 of the Bill confer delegated powers to amend what will become “*retained EU law*”. These clauses have been the subject of much debate and critique. ClientEarth is therefore interested in how retained EU law could be modified otherwise than by way of clauses 7 to 9.
3. We are asked to advise ClientEarth on the likely effect of Schedule 8, Part 1, paragraphs 3(1) and 5(1) of the Bill.
4. Our advice is based in the text of the Bill as amended by Committee and introduced in the House of Lords (HL Bill 79). Any references to the “Explanatory Notes” are therefore to those explanatory notes accompanying HL Bill 79 and dated 18 January 2018.
5. Our advice can be summarised as follows:
 - a. Schedule 8, paragraphs 3(1) and 5(1) enable modifications to be made to retained direct EU legislation by way of subordinate legislation.

- b. We are concerned that retained direct EU legislation is effectively categorised as subordinate legislation for the purposes of amendment, irrespective of its content and importance.
- c. We are further concerned that paragraphs 3(1) and 5(1) impose no additional constraints upon the exercise of delegated powers to modify retained direct EU legislation beyond those imposed by the relevant enabling Acts. Unlike the delegated powers conferred by clauses 7-9 of the Bill, delegated powers conferred by all other current or future legislation may, pursuant to these paragraphs, be used to amend retained direct EU legislation without being subject to any kind of time-limit or condition that they only be used to correct “deficiencies”.
- d. Whilst paragraphs 3(1) and 5(1) only concern amendments to retained direct EU legislation, the susceptibility of other forms of retained EU law to amendment by way of existing or future delegated powers (other than conferred by the Bill itself) is unclear. There is a basic ambiguity in the Bill as to the status of retained EU law after exit day. It is important that this ambiguity be resolved.

B. KEY LEGAL BACKGROUND

- 6. Clause 1 of the Bill repeals the European Communities Act 1972 on “exit day” i.e. 29 March 2019 at 11:00pm (though a Minister may amend this date and time by regulation pursuant to the delegated power conferred by clause 14(5)).
- 7. The repeal of the European Communities Act 1972 removes the ‘conduit pipe’ through which EU law has domestic effect in the United Kingdom. Clauses 2, 3 and 4 of the Bill therefore aim to retain EU law within the domestic legal order post exit day.

(i) **Clause 2 and EU-derived domestic legislation**

8. Clause 2 is designed to retain “*EU-derived domestic legislation*”. Clause 2(1) provides as follows:

“(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.”

9. EU-derived domestic legislation is broadly defined in clause 2(2). It encompasses any enactment so far as:

a. “(a) made under section 2(2) of, or paragraph 1A of Schedule 2 to, the *European Communities Act 1972*”. Subsection (2)(a) is intended to capture subordinate legislation made pursuant to the *European Communities Act 1972* in order to implement the UK’s obligations under EU law. This legislation would otherwise become legally ineffective upon its parent Act being repealed. Much of this category will be subordinate legislation intended to transpose the requirements of EU Directives into domestic law.

b. “(b) passed or made, or operating, for a purpose mentioned in section 2(2)(a) or (b) of that Act”. Subsection 2(b) is intended to capture two categories of domestic legislation. The first is legislation passed or made under delegated legislative powers, other than those conferred by the *European Communities Act 1972*, and for the specific purpose of implementing EU obligations. The second is domestic legislation which was not originally passed or made for this purpose but which has since become part of the way in which the UK complies with EU law. See the Explanatory Notes, paragraph 77.

c. “(c) relating to anything – (i) which falls within paragraph (a) or (b), or (ii) to which section 3(1) or 4(1) applies”. Subsection 2(c) is intended to capture legislation which is connected to the above categories. The Explanatory Notes state this is intended to ensure that provisions “*which are tied in some*

way to EU law, or to domestic law which implements EU law, can continue to operate properly post exit” (paragraph 77)

d. “(d) relating otherwise to the EU or the EEA”. Subsection 2(d) is intended to operate as a residual category. The Explanatory Notes offer the example of an Act of Parliament which makes cross-references to a definition provided in an EU instrument (paragraph 77).

10. We note at this stage that clause 2 includes legislation which does not rely upon the European Communities Act 1972 for its legal effect and thus would continue to operate in domestic law after exit day without any savings provision. The Explanatory Notes (paragraphs 77-78) indicate that the legislative intention for drafting the savings clause so broadly is to ensure that delegated powers conferred by the Bill to modify “retained EU law” can be used to modify all domestic law post-exit day which is somehow connected or relating to the EU/EEA (though only to the extent that such law is so connected or related).

11. Some¹ have queried whether this legislative aim is successfully achieved as the principal delegated powers are expressed by reference to “retained EU law”, a term that is defined in clause 6(7) as meaning “anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of section 2, 3 or 4 or subsection (3) or (6) above...” (emphasis added). In our view, this is resolved by clause 14(6) which provides as follows:

“(6) In this Act references to anything which continues to be domestic law by virtue of section 2 include references to anything to which subsection (1) of that section applies which continues to be domestic law on or after exit day (whether or not it would have done so irrespective of that section).” (emphasis added)

¹ See, for example, Mark Elliott, ‘The Devil in the Detail: Twenty Questions about the EU (Withdrawal) Bill’, 14 August 2017, accessible at <https://publiclawforeveryone.com/2017/08/14/the-devil-in-the-detail-twenty-questions-about-the-eu-withdrawal-bill/>.

(ii) Clause 3 and direct EU legislation

12. Clause 3(2)(a) converts “*direct EU legislation*” (EU regulations, EU decisions and EU tertiary legislation subject to the specific exceptions in clause 14(1) and Schedule 6) into domestic law after exit day.
13. Clause 3 is secondary in effect to clause 2 in that it will not operate to retain direct EU legislation insofar as its effects are reproduced by EU-derived domestic law falling within the scope of clause 2 (subsection 2(a)(iii)).
14. Clause 3 will only convert “*direct EU legislation*” where it has both entered into force and entered into application in the UK before exit day (subsection 3). An instrument can provide that some of its effects will crystallise after exit day, provided that the instrument has itself entered into application before exit day².
15. The Explanatory Notes state that clause 3 is intended to bring the full text of direct EU legislation into domestic law (paragraph 83).

(iii) Clause 4 and directly effective EU rights

16. Clause 4 is headed “*Savings for rights etc. under section 2(1) of the ECA*” and provides insofar as presently material as follows:

“(1) Any rights, powers, liabilities, obligations, restrictions, remedies and procedures which, immediately before exit day-

(a) are recognised and available in domestic law by virtue of section 2(1) of the European Communities Act 1972, and

(b) are enforced, allowed and followed accordingly,

² The Explanatory Notes offer the example of the EU fluorinated greenhouse gases regulation No.517/2014 (paragraph 87). This regulation as a whole entered into application on 1 January 2015 but it contains certain prohibitions which are expressed as commencing after exit day (see, for example, article 13(3) prohibiting the use of certain fluorinated greenhouse gases “*from 1 January 2020*”).

continue on and after exit day to be recognised and available in domestic law (and to be enforced, allowed and followed accordingly).

(2) Subsection (1) does not apply to any rights, powers, liabilities, obligations, restrictions, remedies or procedures so far as they-

(a) form part of domestic law by virtue of section 3, or

(b) arise under an EU directive (including as applied by the EEA agreement) and are not of a kind recognised by the European Court or any court or tribunal in the United Kingdom in a case before exit day (whether or not as an essential part of the decision in the case).

..."

17. Section 2(1) of the European Communities Act 1972 provides as follows:

"(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this subsection applies."

C. THE EFFECT OF SCHEDULE 8, PART 1, PARAGRAPHS 3(1) AND 5(1)

(i) Delegated powers conferred before exit day

18. Schedule 8, Part 1, paragraph 3(1) provides as follows:

"(1) Any power to make, confirm or approve subordinate legislation which was conferred before exit day is to be read, on or after exit day and so far as the context permits or requires, as being capable of being exercised to modify (or, as the case may be, result in the modification of) any retained direct EU legislation."

19. The effect of paragraph 3(1) is to treat retained direct EU legislation as subordinate legislation for the purpose of modification. We note that "*modify*" is defined extremely broadly by clause 14(1) of the Bill so as to encompass amending,

repealing or revoking. After exit day, retained direct EU legislation can therefore be amended, repealed or revoked by subordinate legislation even where this subordinate legislation is made pursuant to a delegated power which is not is 'Henry VIII' power.

20. This reading is confirmed by paragraph 3(2) which provides that any subordinate legislation seeking to modify retained direct EU legislation should be treated as though it were modifying other subordinate legislation for the purposes of determining the procedure (if any) that it must go through before Parliament or the devolved assemblies.
21. Paragraph 3(2) therefore has the effect of lowering the degree of Parliamentary scrutiny that will apply to the exercise of delegated powers to amend retained direct EU legislation. Thus, if an enabling Act states that the exercise of a given delegated power must be subject to the affirmative resolution procedure where it is used to amend primary legislation, but the negative resolution procedure in other cases, paragraph 3(2) will allow Ministers to use the negative resolution procedure in order to amend retained direct EU legislation.
22. Whilst paragraphs 3(1) and 5(1) apply specifically in relation to retained direct EU legislation only, the susceptibility of other forms of retained EU law to amendment by subordinate legislation is left unclear by the Bill. This partly arises from a basic ambiguity in the Bill as to the status of retained EU law as primary legislation, subordinate legislation or something else entirely. This ambiguity has been noted by a number of commentators, including most recently in the Ninth Report of the House of Lords Constitution Committee for Session 2017-19 (HL Paper 69), published 29 January 2018.
23. Paragraph 3(3) then provides that the making of subordinate legislation will not be subject to any implied EU law restriction, such that it can be used to amend legislation in a way that would not have been compatible with EU law pre-exit. For example, pursuant to the Wildlife and Countryside Act 1981, much of the protection afforded to individual species depends upon their inclusion in the Schedules to the Act. Pursuant to section 22, species can be added or removed to

those Schedules pursuant to an order of the relevant Minister³. After exit day, the relevant Minister could therefore exercise this power to remove species whose inclusion is currently required by EU directives (such as the Birds Directive 2009/147). Paragraph 3(3) therefore increases the potential for retained EU law to be amended in significant ways by subordinate legislation after exit day.

24. The combined effect of these paragraphs is to make it far easier for Ministers to use existing delegated powers to amend retained EU law. This is concerning. Retained EU law may deal with matters of such importance that they would in a domestic context be dealt with in primary legislation.
25. In light of the above, we are further concerned that paragraph 3(1) does not appear to place any additional constraints on the use of existing delegated powers to amend retained direct EU legislation beyond those which are imposed by the enabling Act. Unlike the delegated powers conferred in clauses 7-9 of the Bill, for example, there is no time-limit placed on the exercise of powers for this purpose by way of a sunset clause. Nor is there a condition that delegated powers be used only for the purpose of correcting “deficiencies” in retained direct EU legislation.
26. For the avoidance of doubt, we do not consider that Schedule 8, paragraphs 3(1) will have the effect of removing the conditions which would otherwise apply to the exercise of these existing delegated powers (and which will continue to be interpreted restrictively by the courts). This may be what the reference to “*so far as the context permits or requires*” is intended to confirm. The delegated power conferred by section 74 of the Banking Act 2009, by which the Treasury can make regulations relating to the fiscal consequences of any banking stabilisation powers, could not be exercised to amend retained direct EU legislation dealing with the environment post exit day by reason of Schedule 8, paragraph 3(1).
27. Nevertheless, there may be delegated powers which are framed in such a way as to permit amendments to what will become retained EU law in the environmental sector. Indeed, some delegated powers are not sector-specific at all. For example,

³ Section 22(1) provides: “(1) *The Secretary of State may by order, either generally or with respect to particular provisions of this Part, particular areas of Great Britain or particular times of the year, add any bird to, or remove any bird from, any of or any Part of Schedules ZA1 to 4.*”

section 1 of the Legislative and Regulatory Reform Act 2006 confers a delegated power on ministers to make provisions which they consider would serve the purpose of “*removing or reducing any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation*”.

28. Further, many such enabling Acts will have been drafted and passed by Parliament on the understanding that delegated powers cannot be used to modify primary legislation or EU law. The enabling Acts may therefore have been drafted more broadly than they would otherwise have been.

(ii) Delegated powers conferred after exit day

29. Schedule 8, paragraph 5(1) provides as follows:

“(1) Any power to make, confirm or approve subordinate legislation which is conferred on or after exit day may, so far as applicable and unless the contrary intention appears, be exercised so as to modify (or, as the case may be, result in the modification of) any retained direct EU legislation.”

30. It replicates the effect of paragraph 3(1) for powers to make subordinate legislation which are conferred in the future.

31. We note two differences between paragraphs 3 and 5:

a. Paragraph 5(1) uses the language “*so far as applicable and unless the contrary intention appears*”. In contrast, paragraph 3(1) uses the language “*so far as the context permits or requires*”. It is not clear to us whether this difference bears any significance. In our view, both phrases appear to bear the same meaning in substance: namely, that delegated powers may be used to amend retained direct EU legislation where doing so is otherwise compatible with the conditions for their exercise, subject to the ability of Parliament to indicate to the contrary.

- b. There is no equivalent of paragraph 3(2) for future delegated powers. This gives rise to a procedural ambiguity. For example, consider the example given above in paragraph 21 where the type of Parliamentary scrutiny that attaches to an exercise of the delegated power depends upon the classification of the legislation being amended. Is retained direct EU legislation to be deemed subordinate legislation for this purpose by reason of paragraph 5(1)? Or is retained direct EU legislation to be deemed primary legislation (or something else), and the effect of paragraph 5(1) is to upgrade all delegated powers to 'Henry VIII' powers for the purpose of modification?
32. This ambiguity is but one consequence which flows from the more fundamental ambiguity of the Bill which is what status will be given to retained EU law in the domestic legal order after exit day.

D. PROPOSED AMENDMENTS TO THE BILL

33. In light of our advice above, we are also asked to consider an amendment to the Bill which would meet the following objectives:
- a. Provide a default classification of retained EU law as primary or subordinate legislation, based upon whether the retained EU law in question derives from a legislative act enacted under Article 289 of the TFEU or implements such an act.
 - b. Ensure that any changes made to this default classification are subject to proper Parliamentary scrutiny.
 - c. Ensure that, save for where the specific delegated powers conferred by the Bill are available, retained EU law which is classified as primary in accordance with such a system may only be modified by primary legislation.

34. A potential solution in terms of drafting would be as follows:

“Classification of retained EU law

(1) Retained EU law will be deemed to be primary legislation on and after exit day where, immediately before exit day:

- a. It was a legislative act made pursuant to Article 289 of the Treaty on the Functioning of the European Union;
- b. It implemented an act falling within subsection 1(a); or
- c. It was primary legislation.

(2) Retained EU law will be deemed to be subordinate legislation on and after exit day where, immediately before exit day:

- a. It was a decision made pursuant to Article 288 of the Treaty on the functioning of the European Union;
- b. It was a delegated act made pursuant to Article 290 of the Treaty on the Functioning of the European Union;
- c. It was an implementing act made pursuant to Article 291 of the Treaty on the Functioning of the European Union; or
- d. It implemented an act falling within subsections 2(a), (b) or (c) and was not primary legislation.

(3) Modifications to the preceding classification in subsection (1) above may be by regulation. Modifications may not be made by regulation pursuant to this subsection unless:

- a. The relevant Minister considers that it is necessary to do so;

- b. Before a draft of the instrument is laid before Parliament, the relevant Minister makes a statement explaining:
 - i. The instrument or draft;
 - ii. The reasons for it (including that in the Minister's opinion, it is necessary); and
 - iii. Its effect on retained EU law.
 - c. A draft of the instrument has been laid before and approved by resolution of both Houses of Parliament.
- (4) Any power to make, confirm or approve subordinate legislation conferred by any other Act may not be used to modify (or, as the case may be, result in the modification of) of retained EU law insofar as it is deemed to be primary legislation on or after exit day by this section, any regulation made pursuant to subsection 3 above or any other Act of Parliament. Schedule 8, Part 1, paragraphs 3(1) and 5(1) have effect subject to this limitation.

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