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Briefing for the Scottish Government Debate on
Legislative Consent to the European Union
(Withdrawal Agreement) Bill

January 2020



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) introduced in the UK Parliament on 19 December 2019 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 in the Debate on the Scottish Parliament's legislative consent to the bill.

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 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.

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.

We recognise that time is short for the passage of this bill. There have been 4 days of debate in the House of Commons and the time allotted in the House of Lords is currently scheduled to last 7 days.

We have concerns that scrutiny of this legislation and the WA will be disproportionately inadequate considering the importance of the complex issues which require careful consideration.

There is a risk that on this sub-optimal timetable scrutiny may give way to speed. Experience teaches that legislation made in haste may not meet the tests of good law (identified by the Office of Parliamentary Counsel) being law that is necessary, clear, coherent, effective and accessible. The Government should encourage significant engagement both within and out with Parliament to ensure that legislation is as robust as possible.

Part 1: Implementation period

Our Comments

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 January 2020 at 11pm (The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019) 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 39 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 (see clause 29) 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. 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))). We should comment that the use of regulation making power in the bill is widespread and for example in clause 3 enables a Minister to make regulations which modify “any provision made by or under an enactment” (see new section 8A (2)). A similar power is given devolved authorities in clause 4. The power to make regulations in devolved areas can also be exercised by UK Ministers either acting or jointly with Devolved Ministers or on their own. This follows the approach in the EUWA 2018. Clause 41 enables Ministers to “make such provision as the Minister considers appropriate in consequence of this Act”. There is a debate to be had as to whether it is correct that this ministerial power should be exercised when it is “appropriate” as opposed to when it is “necessary”.
- 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. This will have to take place by 31 January.
2. Where aspects of the WAB engage with the Sewel or Legislative Consent Convention the consent of the Devolved Legislatures in Scotland and Wales this has particular relevance to the powers of devolved authorities in Schedule 1 and clauses 12, 13 and 14. Had the Northern Ireland Assembly been in session this would also apply to that body.
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 especially in connection with the extensive Ministerial regulation making powers in the bill.

Part 2: Remaining implementation of withdrawal agreement etc: general

Our Comments

Clause 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.

Clause 6: General Implementation of related EEA EFTA and Swiss Agreements

The UK-Swiss Agreement was finalised in 2018 and completed its CRAGA process in 2019. Clause 6 may purport to implement the related EEA and EFTA Agreements. However, we encourage the Government to explain how this implementation conforms to the CRAGA process? 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).

WA 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. 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 to the WAB.

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) Recognition of professional qualifications Chapter 3 of Title II article 27-29 section 12;
- (c) Coordination of social security systems article 30-36 section 13;
- (d) Non-discrimination, equal treatment rights of workers etc; article 12,23,24 section 14 and
- (e) Independent Monitoring Authority for the Citizens Rights Agreements section 15.

Clause 12: 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.

Clause 13: Coordination of social security systems

Our Comments

We have no comments to make.

Clause 14: Non-discrimination, equal treatment rights of workers etc.

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.

Clause 15: Independent Monitoring Authority for the Citizens' Rights Agreement

Our Comments

This is a very important provision creating the Independent Monitoring Authority (IMA) which will have the obligation to keep under review the adequacy and effectiveness of the law which implements the Citizens' Rights Agreement in Part 2 of the WA and the exercise of functions by public authorities in relation to Part 2 of the WA. It is a key component in ensuring that the WA is properly implemented. It is crucial that the independence of the IMA is sufficiently underpinned by the WAB.

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 Subject Areas

Clause 26 Interpretation of retained EU law and relevant separation agreement law.

This clause amends section 6 of the European Union (Withdrawal) Act 2018. Section 6 provided that the UK Supreme Court or the High Court of Justiciary (when sitting as a court of appeal otherwise than in relation to a compatibility issue) are not bound by any retained EU case law, but may depart from that case law in the same way that the court would depart from its own case law.

Clause 26 would allow regulations to be laid, specifying additional courts or tribunals that could depart from any retained EU case law. These regulations could additionally specify for these courts and tribunals the extent to which or circumstances in which departure from any retained EU case law would be permitted; the test to be applied; or the considerations relevant to that test (or also specifically any considerations relevant to the Supreme Court or High Court of Justiciary in the application their test around precedent, namely the House of Lords Practice Direction on Judicial Precedent)¹.

The degree to which this provision could fetter the discretion of courts in determining the application of precedent raises concerns, not least regarding the separation of powers. There are also concerns about ensuring certainty and predictability in the status of retained EU case law. Departures from existing EU case law were envisaged to be limited in the Department for Exiting the European Union White Paper, *Legislating for the United Kingdom's withdrawal from the European Union*,² which stated, "we propose that

¹ <https://api.parliament.uk/historic-hansard/lords/1966/jul/26/judicial-precedent>

² <https://publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/redbook/redbk45.htm>

the Bill will provide that historic CJEU case law be given the same binding, or precedent, status in our courts as decisions of our own Supreme Court. It is very rare for the Supreme Court to depart from one of its own decisions or that of its predecessor, the House of Lords... We would expect the Supreme Court to take a similar, sparing approach to departing from CJEU case law.” A wider range of courts or tribunals being able to depart from precedent may see a proliferation of decisions around the status of retained EU case law (and, potentially an increase in upward appeals where a higher court could reaffirm the original interpretation and reasoning of CJEU case law). Some courts and tribunals are comprised in whole or in part by lay Judges, some courts have limited geographic scope for any decisions made, for instance, in Scotland where decisions at Sheriff Court level are only binding in that Sheriffdom.

Regulations would require consultation with the President of the Supreme Court, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, the Lord Chief Justice of Northern Ireland, the Senior President of Tribunals, and any other persons considered relevant. However, we believe that wider scrutiny would be required around changes of this significance, engaging, at least, the super-affirmative process to allow wide consultation and scrutiny. Clause 26 could result in divergence of approach within and between the jurisdictions of the UK on matters of law where a common approach is essential, both for legal certainty and the proper operation of that law. Decision on the interpretation of retained EU law should be taken at the highest level, as originally envisaged by the 2018 Act.

Clause 29 Review of EU legislation during the implementation period

This clause inserts a new section 13A into the EU (Withdrawal) Act 2018. It provides additional parliamentary scrutiny for new EU legislation made during the transition or implementation period.

Subsection (2) provides that scrutiny by requiring a Minister to make arrangements for debate and vote on a motion within 14 days where a report is published by the European Scrutiny Committee ('ESC') which meets the following requirements:

- (a) That the ESC considers that any EU legislation made during the transition or implementation period raises a matter of vital national interest to the UK;
- (b) that the ESC has taken appropriate evidence and consulted departmental select committees; and
- (c) that the report sets out the motion to be moved in the House of Commons.

Our Comments

These provisions are satisfactory so far as they go but they do not indicate what if any action the Government will take following the Motion which is debated nor do they take into account any aspects

relating to the Devolved Administrations or Legislatures. We submitted evidence on this issue to the House of Commons European Scrutiny Committee Post-Brexit Scrutiny of EU Law and Policy inquiry³

Clause 31: Repeal of section 13 of EUWA 2018 and Clause 33 Requirements in Part 2 of CRAGA

These clauses repeal section 13 of the EUWA and exclude the WA from the CRAGA process of treaty scrutiny.

Our Comments

In terms of clause 33 approval under the Constitutional Reform and Governance Act 2011 (CRAGA) will not apply to the WA. This restricts the proper processes of scrutiny even further especially in relation to the ratification process. However, clause 33 does not appear to apply to the related EEA EFTA and Swiss agreements (implemented under clause 6). Therefore, CRAGA continues to apply to the EEA EFTA and time needs to be made available for these agreements to pass through that procedure.

Repealing section 13 of the EUWA by clause 32 removes further statutory requirements for scrutiny and approval of the WA and related documents.

Clause 33: Prohibition on extending implementation period

This clause inserts a new section 15A into the EU (Withdrawal) Act 2018 providing that a Minister may not agree in the Joint Committee to an extension to the implementation period.

Our Comments

We note that the implementation or transition period will last from 31 January 2020 at 11pm until 31 December 2020 (at 11pm GMT).

Eleven months seems an unduly short period of time for the negotiation, conclusion and ratification of the Free Trade Agreement and other agreements such as the Security Agreement envisaged by the PD. We note that WA 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 carefully consider the impact of the legislating in such a way as to negative the exercise of the options in Article 132. Whilst some might argue that such legislation does not affect the integrity of the WA, others might be concerned that it does undermine the WA and the spirit of Article 26 of the Vienna Convention on the Law of the Treaty that “Every treaty in force is binding upon the parties to its and must be performed by them in good faith” and of Article 27 that “A party may not invoke the provisions of its internal law as justification for its failure to perform treaty....”

Furthermore, as Clause 38 states “(1) It is recognised that the Parliament of the United Kingdom is

³ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/european-scrutiny-committee/postbrexit-scrutiny-of-eu-law-and-policy/written/105987.html>

sovereign”. This imports that Parliament “cannot fetter itself for the future” – (Feldman “English Public Law” 2.143) which means that if the Government so chose it could amend the WAB in the future to provide for the application of Article 132. Does the Government propose to entrench the prohibition against exercising the options in Article 132 or is entrenching simply not possible given the concept of Parliamentary sovereignty?’

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