Briefing for Peers

European Union (Withdrawal Agreement) Bill
Monday 13 January 2020

About us
The Bar Council is the representative body for the Bar of England and Wales, representing approximately 16,500 barristers.

The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts. It provides a pool of talent, from increasingly diverse backgrounds, from which a significant proportion of the judiciary is drawn, and on whose independence the rule of law and our democratic way of life depends.

Background
The European Union (Withdrawal Agreement) Bill 2019-20 ("the December Bill") was introduced to the House of Commons on 19 December 2019. It is due to be introduced to the House of Lords in the week commencing 13 January 2019, proceeding immediately to a second reading and committee stage. The Bill recasts the European Union (Withdrawal Agreement) Bill 2019 ("the October Bill") which was introduced to Parliament on 21 October 2019. The House of Commons voted for the October Bill at Second Reading, but the House did not vote in favour of the timetable to debate that Bill. Parliament subsequently legislated for an early general election and was dissolved on 6 November 2019.

Whilst the purpose of the December Bill remains the same as that of the October Bill – to ratify and implement the Withdrawal Agreement, as agreed between the United Kingdom and the European Union, for it to have domestic legal effect and to enable HM Government to ratify the Withdrawal Agreement – there are significant additions and deletions. The Bar Council wishes to focus on two particular changes described further below.

Parliamentary oversight of the negotiations for the future relationship
Clause 31 of the October Bill required the following: a Minister to put a report before Parliament on the objectives of the future relationship negotiations; parliamentary approval of those objectives; negotiations to be carried out on that basis or a revised report to be submitted; negotiation progress updates; the resulting future relationship agreement to be laid before Parliament; and MPs to approve the agreement before it could be ratified. All of these provisions have been deleted.

In a dualist legal system such as the UK, an international treaty, although binding in international law, does not alter domestic law unless and until the treaty is incorporated into the domestic legal system by legislation. It is for this reason that a Bill is required and, for the same reason, domestic legislation will be required to give effect in UK law to any future relationship between the UK and EU. Deleting the requirement for Parliament to have oversight over the negotiations between the UK and EU in the knowledge that parliamentary approval of the resulting future relationship agreement remains a requirement makes little sense and fails to respect the proper role that Parliament should play in the negotiating process. It risks Parliament raising concerns late in the day which could have been addressed in the negotiating process were Parliament able to contribute at an earlier stage. Above all, it undermines parliamentary sovereignty and it fails to respect the essence of dualism as opposed to monism which requires more than a mere rubber-stamping of an international agreement.

Interpretation of retained EU case law

The EU (Withdrawal) Act 2018 ("the EUWA") makes provision for retained EU case law to continue to have effect in the UK in order to preserve legal certainty, whilst permitting the Supreme Court and High Court of Justiciary to depart from such case law in the same way as those higher courts may decide to depart from their own case law.

Clause 26(1)(b) inserts a new subsection 6(4)(ba) EUWA to permit the lower courts to depart from retained EU case law, to the extent that they are permitted to do so by regulations made under new subsection 5A EUWA. Without this provision, the lower courts would be bound to follow the rulings of the Supreme Court / High Court of Justiciary on retained EU case law but otherwise would have to follow the rulings of the European Court of Justice ("CJEU") unless and until domestic law was changed or the higher courts departed from the rulings.

New subsection 5A gives a power to a Minister of the Crown, acting after consultation, to make regulations on how the lower courts can interpret retained EU law, including providing for the circumstances under which lower courts are not bound by retained EU case law. The regulations may also set the test that is to be applied in deciding whether to depart from such retained EU case law. The regulations may, however, provide that the test may be determined by a given list of members of the judiciary, which is itself a very unusual form of delegation of law-making powers.

These new provisions risk the possibility of creating legal uncertainty and confusion. EU case law forms a key part of the current corpus of law in the UK: retention until considered decisions can be made on *what* should change, *how* it should change and *who* should change it is essential to ensure the continued functioning of the UK legal system. Maintaining convergence or permitting divergence from EU case law is also critical to the UK's negotiating position on the future relationship with the EU, particularly given that in some areas (notably financial services) the EU is placing significance on UK convergence with EU rules.

The new provisions could also create asymmetry between the tests applied by the higher and lower courts in deciding whether to depart from retained EU case law. It is possible that the lower courts could have a wider power to depart than the higher courts. The setting of

precedents is unclear and opens the possibility of inconsistent application of the law as lower courts make their own decisions on whether to follow or depart from retained EU case law.

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