BAR COUNCIL PARLIAMENTARY BRIEFING

HOUSE OF COMMONS SECOND READING
EUROPEAN UNION (WITHDRAWAL) BILL

1. This briefing from the General Council of the Bar of England and Wales (the Bar Council) outlines the profession's concerns over the European Union (Withdrawal) Bill.

These concerns relate to:

- The derogation of citizens' rights and the ability of businesses and other stakeholders to challenge executive decision-making and interpretation of the law
- Henry VIII powers conferred on ministers to amend English law
- Devolution: Challenges to the powers and integrity of the Welsh Assembly
- Environmental law: The need for clarity and certainty
- The coherence of UK legislation and policy and the impact of a rigid exit day cut-off, and
- Responsibility for regulatory roles performed by EU bodies and institutions

Citizens' rights and challenges to executive decision-making

2. As drafted, the Bill removes the opportunity for challenging EU law brought into English law, and also executive decisions made under it, on the basis of general principles of EU law. The Bill amounts therefore to a reduction in the rights currently enjoyed by UK citizens and will afford them less protection against the power of the state. Rights are not being brought home but abolished. These losses are in addition to the inevitable loss, on leaving the EU, of the rights of UK citizens and businesses to benefit from EU rights in other EU states.

3. Clause 3 incorporates direct EU legislation made up mainly of EU regulations and decisions. But Schedule 1 paragraph 1 prevents a UK court, after exit day, from making any decision about the validity of those instruments. So a pre-exit EU instrument that interferes with, say, data privacy and is found invalid in the EU for incompatibility with Article 16 of the TFEU (which guarantees the right to protection of personal data) will continue to apply in the UK as a result of Clause 3, but UK citizens would be unable to use domestic courts to challenge it.

4. The terms of the Bill also make it unclear whether UK courts can apply the Treaties when interpreting EU regulations. For example, the General Data Protection Regulation (GDPR) was made under TFEU Article 16. But implementation of rights inevitably narrows the right. So it is important that when interpreting and applying the GDPR, the UK courts

should be able to apply the underlying Treaty provision. The Bill ought to make this clear. The same considerations arise whenever rights conferred on citizens or business by the Treaties are implemented through EU directives or regulations that will become part of UK law under the Bill.

5. In this context, the status of CJEU caselaw is also an area of concern. Under Clause 3, pre-exit day CJEU caselaw relating to data protection directives will be placed in UK statute as retained EU law, but future rulings will not. After exit day, EU citizens will benefit from CJEU rulings which draw on the rights outlined in directives and provisions (in the example of the GDPR, it is Article 16), but UK citizens will not have the same benefit. Where legislation coming into English law is based on a right, the intent should be to incorporate the right into English law too.

6. Additionally, Schedule 1 removes the right of UK citizens and businesses to challenge EU law that is brought into English law (unless separate regulations are made to permit this) and also administrative decisions on the grounds of general principles of EU law. Those principles include non-discrimination, proportionality, legal certainty and the rights of defence. The result is that any challenge will be limited to more restrictive English law grounds such as rationality. For example, in 2014, the Welsh Government took the decision to give ten times as much farming aid to lowland farmers as hill farmers. Under pre-Brexit arrangements, by reference to principles of EU law, this was considered to be unlawful discrimination between groups of farmers and the Welsh Assembly Government conceded in the face of legal challenge. Under the terms of the Bill however, Welsh farmers would not have the right to challenge that decision on those grounds post exit day. Seeking to protect retained EU law and ministers' decisions from challenges to their validity and holding ministers to lesser standards of conduct amounts to further transfer of power to Government.

7. The Bar Council urges Parliament carefully to consider making provisions to ensure that the Bill does not reduce the rights of UK (and of course non-UK EU) citizens or their protection against the power of the state.

Henry VIII Powers conferred on Ministers to modify English law

8. Ministers' powers under Clause 7 to make regulations to 'prevent, remedy or mitigate' any 'deficiency' in retained EU law include an open-ended power to make 'any provision that could be made by Act of Parliament'. This Henry VIII power to repeal or amend legislation relates to whole tracts of the statute book, not just those Acts that implement EU legislation. There are comparable powers in Clauses 8 ("prevent or remedy" any breach of the UK's international obligations) and 9 (implementation of withdrawal agreement).

9. Whilst the ECA 1972 itself contains a similarly wide power, that is in the context of implementation of EU legislation that has been subject to a process of enactment involving the European Parliament and, in most cases, contributions from national Parliaments. That background lends legitimacy to what would otherwise be an objectionably broad Henry VIII provision. Clause 7 would however implement Ministerial policy, decided behind closed doors.

10. The House of Lords Select Committee on the Constitution recognised that point in its 9th report of 2016-1, on delegated powers in recommending that any new law-making powers given to Ministers to alter the 'repatriated' EU acquis should be carefully defined and subject to 'enhanced scrutiny arrangements'.

11. The scope of Ministers' powers – especially under Clause 7 – coupled with entirely standard, rather than 'enhanced' arrangements for Parliamentary scrutiny (the Bill proposes the usual negative and affirmative procedures) fail to meet that recommendation or the constitutional principles behind it.

12. The Bar Council urges Parliament carefully to examine the terms of Ministers' regulation-making power under Clauses 7 to 9 and the procedural safeguards for its exercise.

Devolution: Challenges to the powers and integrity of Welsh Assembly

13. Clause 11 would place new constraints on the National Assembly for Wales' ability after exit day, to legislate on matters where it currently operates within legislative frameworks developed by the EU and on matters that currently sit within its own areas of legislative competence. This would allow the UK Government to impose new UK-wide frameworks for policies in fields currently in the competence of the National Assembly such as the environment, agriculture and fisheries. Such provisions therefore threaten the stability of our devolved constitutional arrangements and the legitimacy of the Welsh Assembly.

14. Compared with their Westminster counterparts, Welsh Ministers' powers (Clause 10 – Schedule 2 Part 1) to amend retained EU law to deal with deficiencies arising from withdrawal) are limited and constrained.

15. Additionally, Welsh Ministers will not have the power to amend directly applicable EU law (regulations and directives) which account for most of the EU legislative framework for a range of policy areas including, for example, agriculture. This power would be retained solely by the UK Government.

16. In contravention of the Sewel Convention, UK Ministers will therefore retain powers – in parallel with, but also superior to, those of Welsh Ministers – to amend any legislation within devolved competence of the National Assembly without being answerable to the Assembly or to require a legislative consent motion to be passed by the National Assembly.

17. The Bar Council therefore urges inclusion in the Bill of provisions to ensure that the Government acts in accordance with the Sewel Convention and that legislation is not passed on devolved matters without the legislative consent of the National Assembly.

Environmental law: The need for clarity and coherence

18. The great majority of UK environmental law is based on EU directives transposed into UK legislation. Such law is also shaped by relevant CJEU rulings on the interpretation of EU law, rulings on actions brought by the EU Commission, as well as on international conventions and agreements.

19. To provide certainty to businesses and stakeholders, the Government has set out in White Paper 2 that 'any question as to the meaning of EU-derived law will be determined in the UK courts by reference to the CJEU's case law as it exists on the day we leave the EU', to which UK courts will give the same status as decisions of our own Supreme Court. After exit day, the principle of supremacy of EU law over UK law will no longer apply (Clause 5), and CJEU case law made after exit day will not need to be taken in to account by UK courts when interpreting retained EU environmental law (Clause 6).

20. These provisions create a clear potential for uncertainty for businesses and other stakeholders as different tiers of case law may emerge. After exit day, retained EU environmental law, as well as new directives which the UK choses voluntarily to adopt, will likely be interpreted differently by the CJEU and UK courts.

21. Separately, the Bill does not answer the question as to which international environmental agreements the UK will remain a party, particularly those which the EU entered into on behalf of Member States.

22. Additionally, the Bill does not address the question as to future changes to international conventions (such as changes to the lists of endangered species in CITIES). Without a new mechanism for updating the UK's domestic regulation, a 'snap-shot' of EU law, taken on the day of Brexit, would quickly become out-of-date and potentially put the UK in non-compliance with its international obligations.

23. The Bar Council urges inclusion of provisions to ensure clarity as to how courts should approach future CJEU case law so as to avoid the possibility of a wide divergence of approach and likely litigation and challenge. Clarity is also required as to the inter-relationship of international treaties and retained EU law.

The coherence of UK legislation and policy and the impact of a rigid exit day cut-off

24. Clause 3(3) will convert EU law into domestic law in so far as a relevant instrument has entered into force and applied before exit day. EU legislation is, however, often produced as 'packages' of laws around a particular policy area with different provisions applying and coming into force at different times. Clause 3 creates a cut-off point at exit day which means that the UK will adopt some provisions in relation to a particular area of policy but not those that are part of the same package of measures which do not apply and come in to force until after exit day. It will be difficult for the UK Government and those affected by the law to establish which provisions of a legal package will become retained law under clause 3(3) but it is also unclear what approach will be taken to those provisions that do not become retained law under clause 3(3) but which are an integral part of the package that is converted into domestic law.

25. The Bar Council suggests some flexibility is incorporated in to the Bill to allow whole packages of legislation to be adopted into UK law where it will allow the adoption of measures which are both coherent and in line with Government policy.

Responsibility for regulatory roles performed by EU bodies and institutions

26. The Bill does not provide clarity to business about which domestic bodies will inherit the functions of various EU institutions and bodies, such as the European Supervisory Authorities which are, amongst other things, responsible for the essential tasks of drafting regulatory and implementing technical standards (a form of tertiary legislation, also known as level 2 of the Lamfalussy process for making EU financial services legislation).

27. In addition to tertiary legislation, financial services regulation, for example, depends heavily on EU level guidance and questions and answers from the Commission and the European Supervisory Authorities (level 3 of the Lamfalussy process). This sector, among others, requires certainty as to which UK body will be responsible for that corpus of regulatory guidance and whether it will become "retained" guidance.

28. The Bar Council urges the Government to provide clarity, even if not in this Bill, as to which domestic bodies will, post exit day, be responsible for regulatory functions that are essential to businesses across a wide range of sectors.

Bar Council

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