NATIONAL ASSEMBLY FOR WALES

CONSTITUTIONAL AND LEGISLATIVE AFFAIRS COMMITTEE

INQUIRY INTO THE POWERS IN THE EU (WITHDRAWAL) BILL TO MAKE SUBORDINATE LEGISLATION

Written Evidence from Professor Thomas Glyn Watkin

1. I am grateful to the Constitutional and Legislative Affairs Committee for the invitation to make a written submission and participate in the panel session in relation to this inquiry. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated.

2. This paper was written following the amendment of the EU (Withdrawal) Bill during its Committee Stage in the House of Commons, while its Report Stage and Third Reading in the Commons as taking place and prior to its consideration by the House of Lords. Footnotes have been added in an attempt to cover relevant amendments made at Report.

The EU (Withdrawal) Bill and subordinate law-making powers

3. The Bill proposes to provide for the withdrawal of the UK from the EU by repealing the European Communities Act 1972 and converting EU law as it applies on the day of withdrawal ('exit day') into a distinct body of law (termed 'retained EU law') within the domestic law of the UK.

4. The Bill recognizes that retained EU law will be 'deficient' in a number of ways (s.7 (1) & (2)). Power is therefore given to 'prevent, remedy or mitigate' these deficiencies. This power is to be exercised by Ministers of the Crown making regulations in the form of statutory instruments. Ministers are empowered to make such provision as they consider 'appropriate' to achieve this. Subject to certain limitations (s.7(6)), the power enables a Minister 'to make any provision that could be made by an Act of Parliament' (s.7(4)). It is a 'Henry VIII' power. Usually, the exercise of such a power requires approval by resolution of both Houses of Parliament.

5. The power enables Ministers to make changes to the body of retained EU law. This body of law has three components, as set out in sections 2, 3 and 4 of the Bill.

   - EU legislation which applies directly to the UK as a member State (s.3);
   - Rights, powers, liabilities, obligations, restrictions, remedies and procedures which exist as a consequence of EU membership (s.4);
   - Laws which have been enacted as part of UK domestic law but are derived from EU law as a consequence of UK membership (s.2).

   All three components are amendable as deemed appropriate by a Minister of the Crown to prevent, remedy or mitigate deficiencies.

6. The Bill also proposes that Ministers of the Crown may make regulations to make such provision as they deem appropriate to prevent or remedy any breach of a UK international obligation which might otherwise arise from UK's leaving the EU (s.8). Ministers may also make such provision as they deem appropriate to implement the withdrawal agreement if they consider such a provision should be in force by exit day, unless Parliament has already enacted a statute approving the final terms of withdrawal (s.9, as amended). In both of these instances, and subject to certain limitations (ss.8(3) & 9(3)), the power enables a Minister 'to make any provision that could be made by an Act of Parliament' (ss. 8(2) & 9(2)), and – in the case of the power given by section 9 – this includes the power to modify the EU (Withdrawal) Act itself.

7. Corresponding powers are given to devolved authorities, and therefore to the Welsh Ministers in relation to Wales (s. 11 and Schedule 2). The correspondence however is not exact. The devolved authorities are only permitted to legislate regarding one component of retained EU law, namely EU-derived domestic law (Schedule 2, ¶¶ 3, 15 & 23),[1] and are not permitted to make modifications to the EU (Withdrawal) Act where that is allowed to Ministers of the Crown (Schedule 2, ¶ 21(4)(e)). Their exercise of the powers is limited to the devolved competence of, in Wales, the National Assembly or the Welsh Ministers, and where the competence requires the consent of, or consultation with, a Minister of the Crown, it must be obtained or take place. In addition, consultation with UK ministers is required regarding certain uses of the powers.[2]

Scrutiny of the relevant statutory instruments

8. Provision with regard to the scrutiny of the statutory instruments containing regulations is set out in Schedule 7 of the Bill, brought into effect by section 16.

9. Despite the generally accepted principle that statutory instruments amending primary legislation by means of secondary legislation should require affirmative resolution by both Houses of Parliament, the Bill as introduced limited the use of the affirmative procedure to a narrower range of instruments, namely those which either:–

    - established public authorities within the UK, or
    - provided for the transfer of an erstwhile EU function to one of the *new* UK public authorities, or
    - provided for an erstwhile EU *legislative* function to be exercised by a UK public authority, or
    - made provision relating to the fees of UK public authorities regarding the exercise of their functions, or
    - created or widened criminal offences, or
    - created or amended the power to legislate.

[1] Unless the modification is not in breach of the proposed restriction on modifying retained EU law as a consequence of provision made in an Order in Council: see Schedule 2 as amended on Report, ¶¶ 3(4); 15(4), and 23(4).

[2] Schedule2, ¶ 5. The original provision required UK Ministerial consent in the relevant circumstances, but this was amended to consultation on Report.

Affirmative procedure would also be required for an instrument which sought to amend the EU (Withdrawal) Act itself.

10. It was proposed that instruments which did not fall into one or more of these categories should be subject to the negative resolution procedure. They would become law by being made – even where they amended primary legislation – and would remain law unless annulled in pursuance of a resolution in either House, (Schedule 7, ¶¶ 1 (1)-(3); 6 (1)-(3); 7 (1)-(3)).

11. The transfer of an existing EU function which is not of a legislative character to an already existing UK public authority is not intended to attract the affirmative procedure. From the perspective of devolved government in Wales and the legislative competence of the National Assembly, this has the consequence that the transfer of a function to a public authority which is not a devolved Welsh authority (within the meaning of that term in the Government of Wales Act 2006 as amended by the Wales Act 2017) places its subsequent modification beyond the reach of Assembly legislation unless the consent of the UK government to the modification is obtained.

12. Similar scrutiny procedures for the devolved authorities are proposed. With regard to Wales, it is proposed that the same categories of statutory instrument should attract affirmative procedure in the Assembly and that the negative procedure should apply to others (Schedule 7, ¶¶ 1 (7)–(8); 6 (5)–(6) & 7 (5)–(6), as amended).

Sifting mechanism

13. Dissatisfaction with the breadth of these powers resulted in amendments to the proposed Schedule 7 during Committee Stage in the House of Commons. A 'sift' mechanism was inserted into the Bill as new paragraphs 3 and 12 to Schedule 7. This provides that statutory instruments exercising the powers given in relation to retained EU law, international obligations and the implementation of withdrawal are not to be made using the negative procedure unless the Minister has laid before the House of Commons a draft of the instrument together with a written statement setting out his opinion that it should be subject to the negative procedure and his reasons for holding that view. The Minister can then make the instrument, but only if a Commons committee charged with considering the issue has made a recommendation regarding the appropriate procedure or has failed to make such a recommendation within 10 sitting days.

14. The Bill as it currently stands does not make provision for similar sift mechanisms with regard to the scrutiny of instruments by the devolved legislatures. It is submitted that, it having been decided that such a mechanism is appropriate at Westminster, for the same reasons one would be appropriate in the devolved legislatures. Within the National Assembly consideration should be given to allocating the sift either to the Constitutional and Legislative Affairs Committee or to a committee specifically established for the purpose. A suitable amendment should be made to the relevant provisions in the EU (Withdrawal) Bill to permit that to occur.

15. The situation of the devolved authorities in Wales raises a further issue regarding the use of the negative procedure and the implementation of a sifting process. A government without a majority cannot guarantee the approval of statutory instruments

under the affirmative procedure nor prevent their rejection by negative procedure. In an Assembly in which the government and other party groupings are evenly balanced, a tied vote on an affirmative procedure results in the instrument not being approved, while a tied vote on a motion to annul means that the instrument remains valid. The sifting mechanism therefore assumes even greater significance.

Capacity

16. Scrutiny before the Westminster Parliament is expected to absorb a great deal of parliamentary time. Even with several hundred MPs in the House of Commons and an even greater number of peers in the Lords available to contribute to the work, the task is daunting. The task before the devolved legislatures is even more so. With fewer than 50 AMs in the Assembly who can serve on scrutiny committees, there is going to be great pressure on their time and on that of the Assembly Commission staff who will have to service their deliberations. There is also a considerable challenge before the civil servants within the Welsh Government to produce the statutory instruments to effect the modifications considered to be appropriate.

Scrutiny of Westminster SIs

17. As noted above regarding the transfer of current EU functions to UK public authorities, the content of the subordinate legislation made at Westminster can have significant consequences for the devolved administrations. In that the devolved authorities are initially limited to modifying retained EU-derived domestic law[3] whereas UK Ministers can also modify retained direct EU law and other rights etc., which are recognized as a consequence of EU membership, the modifications made by UK Ministers in areas of retained EU law which correspond to matters which are not reserved can affect both the legislative and executive competence of the devolved administrations. To ensure that the exercise of these powers by UK Ministers does not have detrimental consequences for the devolved administrations, some scrutiny of such statutory instruments by them would be required. This could be achieved by requiring all instruments to be laid in draft before the devolved legislatures as well as the Westminster Parliament so as to enable them to comment upon and suggest changes to the draft – in essence by using bespoke super-affirmative and enhanced negative procedures. This would, of course, increase yet further the burden upon the limited capacity of the devolved administrations.

18. Given the importance of the modifications which may be made, it may even be thought appropriate to increase the ambit of Standing Order 30A so as to include those elements of retained EU law which are not open to modification by the Welsh Ministers.[4]

19. In relation to several of these points, it would be beneficial for the relevant Assembly subject committees to comment on the proposed subordinate legislation as well as

[3] And remain so limited until Orders in Council have been made relaxing the limitation under the new paragraphs 3(4), 15(4) and 23(4) of the proposed Schedule 2.

[4] This might not have been necessary if the Right Hon. Dominic Grieve MP's amendment to the Bill, defining what would constitute primary and secondary legislation for the purposes of modifying EU law, had been incorporated on Report, but the amendment (NC13) was not called.

having them referred to CLAC or any special committee established to scrutinize Brexit instruments. Possibly the subject committees should comment to the relevant committee for their views to be included in the one report. Such a procedure should apply in the context of involvement in any enhanced procedures adopted for UK SIs as well.

20. Finally, it might be thought appropriate to establish a standing consultation mechanism to enable expert opinion to be taken on the proposed subordinate legislation both at the Assembly and in Westminster. Experts in the devolved policy areas as well as those learned in EU law might be enabled to comment quickly and effectively on proposed SIs for the benefit of the relevant committees. It might even be thought suitable for advice to be given to the sift committee at Westminster, and its remit expressly broadened to allow it to recommend where appropriate the use of bespoke super-affirmative and enhanced negative procedures aimed at involving the devolved administrations in the scrutiny process of Westminster SIs.

Thomas Glyn Watkin[*]
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[*] Professor Thomas Glyn Watkin, since retiring, has been an honorary professor at both Bangor and Cardiff Law Schools. Prior to retirement, he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a Fellow of the Learned Society of Wales, and an ordinary academic bencher of the Middle Temple.