Cynulliad Cenedlaethol Cymru / National Assembly for Wales

Y Pwyllgor Materion Cyfansoddiadol a Deddfwriaethol a'r Pwyllgor Materion Allanol a Deddfwriaeth Ychwanegol / The Constitutional and Legislative Affairs Committee and the External Affairs and Additional Legislation Committee

Ymgynghoriad ar Fil yr Undeb Ewropeaidd (Ymadael) a'i oblygiadau i Gymru / The European Union (Withdrawal) Bill and its implications for Wales

EUWB 01

Ymateb gan Yr Athro John Bell / Evidence from Professor John Bell

Structure

The structure of the Bill is inappropriate. Too much of significance is in the Schedules. For example, many of the significant provisions to deal with devolved assemblies. Clause 10 is very limited in detail and simply gives effect to Schedule 2 where major issues of procedure are hidden. Clause 11 is drafted in such a way as to hide the extent of the restriction on the future competences of devolved assemblies.

In addition, the European Union (Withdrawal) Bill provides powers to a Minister of the Crown under Schedule 7, para. 3, to make regulations, if he claims it is urgent for achieving an effective law on Brexit day. Such regulations may do what could otherwise be done by Act of Parliament (cl. 7(4)). They can be made without a draft being presented to Parliament and without parliamentary approval. (This 'made affirmative procedure' is explained in laconic terms by para. 227 of the Explanatory Memorandum and para. 48 of the Memorandum on Delegated Powers.) They remain in force for a month before they need approval. These provisions are found in the Schedule on "Scrutiny of Powers", but no scrutiny is actually provided. These urgency powers are so significant that they should be in a separate clause, not in a Schedule.

Retained EU law

Clause 6 has a muddled understanding of EU law which is unclear and unhelpful. It will make it more difficult to make transposed EU law simply an ordinary part of the laws of Scotland, England, Wales and Northern Ireland. Rather than being transformed directly into living law within the various

national legal systems of the UK, EU law continues to exist as a self-standing entity, whose content is defined either as case law or general principles of law which were in force on the day before exit day, or the legislative rules which have been transposed into UK law under clauses 2 to 4. It will function as a kind of *zombie EU law*, which died on exit day, but continues undead to govern the courts and the devolved assemblies for years to come, well beyond the sunset period for the exercise of powers under the Bill.

1. The technique used here is far more detailed than in sections of bills which preserve the pre-existing law in relation to transitions from one regime to another, e.g. s. 5 Seychelles Act 1976. These previous Acts of Parliament simply create a default position that existing law will continue to apply unless it has been changed explicitly. That is done sufficiently by clauses 2(1) and 3(1). But the Bill goes further. In the EU(W)B, EU law is essentially frozen on 29 March 2019 (exit day) and then it operates as a higher law restricting the courts (clause 6) and the devolved assemblies (clause 10 and Schedule 2), until specific measures are made in Westminster to thaw parts of it. That has the effect of vesting most of the powers which are repatriated from Brussels in Westminster, except when Westminster has specifically devolved them. It retains the priority of EU law over national courts, except insofar as the UK Supreme Court (not the national appeal courts) determine. The status of retained EU law will continue beyond the two years of the powers within the EU(W)B.

2. The basic EU law position should be as follows:

Treaties and Directives which have not been implemented lapse on exit day.

Directives which have been implemented are already law in the UK and continue to be so (clause 2(1), unless the text is modified under the EU(W)B. The national legislation will make it clear that the Directive is a guide to the intention of Parliament and that continues to be the case.

Regulations and tertiary legislation which have direct effect need to be transposed into the various national laws within the UK by virtue of powers within the EU(W)B. This is the primary focus of the EU(W)B. Clause 3 gives this the epithet “retained direct EU legislation”. If the subject matter of these regulations would fall within devolved powers on the day after exit, then it

seems unreasonable that a devolved assembly cannot legislate on the matter simply because it was EU law (and thus outside its competence) on the day before exit.

Scrutiny

The provisions on Scrutiny are inadequate.

1. The provisions on devolution include provisions on joint decision by a Minister of the Crown and a Welsh Minister. But, in this context, the provisions for scrutiny are terse in Schedule 7, para. 2. The laying before both the Assembly and the UK Parliament will require careful coordination, particularly in relation to timing. If the procedures in Cardiff and Westminster have to be sequenced, then there will not be much time to achieve this between the Act coming into force and exit day. It might have been better for the legislation to provide for legislation to be made in Cardiff, with a consent certificate from the UK Minister of the Crown, rather than a full Westminster delegated legislation process.
2. The Bill does not recognise the magnitude of the task and therefore the need to have differently designed procedures to ensure adequate scrutiny. Current estimates I have heard from officials suggest the number of EU provisions to be amended is over 1000. The Bill assumes current procedures will be used, but that is simply not possible. Very serious attention needs to be given to how scrutiny will operate.

Devolution

Contrary to what was suggested by the Constitution Committee and by the Welsh Assembly, there has been no expansion of the competence of the devolved assemblies. The structure adopted is that the supremacy of EU law as a field outside the competence of the devolved assemblies is replaced by the supremacy of Whitehall-controlled “retained EU law”. The devolved assemblies are not allowed to modify retained EU law unless this is authorised by Order in Council made by a Minister of the Crown.

For instance, s. 80 of the Government of Wales Act 2006 is amended to exclude competence of the Welsh Assembly to make legislation in respect of "retained EU law" (Schedule 3, para. 2 and clause 11). Corresponding provisions are made for the other devolved assemblies.

Clause 6(7) defines retained EU law to include case law and general principles of law fixed in content on the day prior to exit day. This effectively creates a form of zombie EU law – a law which has died but continues to exercise an influence over what the Assembly can do. The Assembly is going to need a textbook which states what was EU law on 29 March 2019 in order to carry out its functions not merely during the two years post-Brexit for which the Bill authorises powers, but for years to come beyond that. The idea that EU law in this state continues to govern devolution creates a distortion of the balance of powers between Whitehall/Westminster and devolved territories. In effect, the Cardiff Assembly will have a Whitehall zombie present to regulate the exercise of its powers, unless Whitehall consents to confer more powers within the two years of the life of the European Union (Withdrawal) Act. Para. 69 of the Memorandum on Delegated Powers provides an inadequate justification for this effective replacement of Brussels by Westminster and Whitehall.

Overall

The Bill is difficult to read and to follow its logic. It is a measure for which a Preamble similar to that which is provided by the recitals of any EU legislation would be really helpful to guide the many people who have to interpret it.

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