

Scrutiny of secondary legislation under the EU Withdrawal Act 2018

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Introduction

- EUWA 2018 – constitutional statute
- Grants Ministers very broad delegated powers to amend existing primary and secondary legislation in consequence of the repeal of the ECA72.
- Purpose – to ensure that the statute book functions ‘as normal’ after exit day.

- Aim of this talk:
 - Summarise the powers under the Act to amend legislation
 - Give you an overview of the new processes for doing so

Main powers exercisable by regs (1)

- a) Dealing with deficiencies in retained EU law arising from withdrawal (section 8 of the Act);
- b) Implementing any withdrawal agreement (section 9);
- c) Making consequential provision (section 23(1)).

Main powers exercisable by regs (2)

- d) Providing for fees and charges in relation to functions which public authorities may have as a consequence of regulations made under (a) or (b) above (section 14(1) of and Schedule 4 to the Act);
- e) Authorising challenges to the validity of retained EU law (section 5(6) and Schedule 1);
- f) Repealing provisions in devolution acts relating to devolution restrictions in retained EU law (section 12(9));
- g) Providing for the admissibility of evidence in legal proceedings (Schedule 5, paragraph 4);
- h) Amending the definition of 'exit day' in the Act (section 20(4));

Main powers exercisable by regs (3)

- i) Making transitional, transitory or saving provision considered by Ministers to be appropriate in connection with the coming into force of any provision of the Act (section 23(6))

Process

- Where powers listed at (a) to (c) above are exercised, the statutory instrument, if not subject to the affirmative procedure, is subject to the sifting procedure.
- Where the powers listed at (d) to (h) are exercised, the statutory instrument is subject to the affirmative procedure.
- Where the powers listed at (i) are exercised, there is a Ministerial discretion as to the appropriateness of the procedure which should be chosen.

Powers (a)-(c) above

- Powers under: s8, s9 and 23
 - Certain exercises of the powers under s8 and 9 are required, by the terms of the Act, to be laid via the affirmative procedure (see Sch7, paras.1(1), 1(2), 10(1), 10(2))
 - But if not:
 - The Minister may lay an instrument subject to the affirmative procedure
 - If he does not, but proposes to lay it via the negative procedure:
 - That proposal goes through the sift process.

THE SIFT PROCESS (1)

In summary:

- Minister must lay before both Houses a proposal incl a draft of the proposed instrument + a memorandum of Min's opinion that it should be subject to the negative procedure + reasons (Sch.7 para.3(3) and 17(3)).
- Committee have 10 sitting days in which to make a recommendation as to the appropriate procedure for the instrument. If none made, Minister may make the instrument and lay it before Parliament under the negative procedure (Sch.7 para.3(4)-(5), 3(10)-(11)).

THE SIFT PROCESS (2)

- If Committee has recommended a procedure for the instrument, and the Minister disagrees with the recommendation, the Minister may make the instrument and lay it, but not until he has made a statement explaining why he disagrees with the Committee's recommendation (Sch7 para 3(7)-(7)).
- If the Minister fails to make a statement required before the instrument is made, a Minister of the Crown must make a statement explaining why the Minister has failed to do so (sch.7 para.3(8)).

THE SIFT PROCESS (3)

- The sift process does not apply where there is a declaration of urgency.
 - Separate procedure for that in Sch.7.
- Sift is carried out by a new Parliamentary Committee: The European Statutory Instruments Committee (“ESIC”)

THE SIFT PROCESS (4)

- The key judgments for ESIC to make in respect of each proposed negative instrument will be:
 - a) whether it contains provisions which, under the European Union (Withdrawal) Act, require it to be subject to the affirmative procedure, and
 - a) whether it otherwise merits being subject to the affirmative procedure.

THE SIFT PROCESS (5)

- The determination to be made under (b) is likely to bring a greater range of considerations to bear, including:
 - Whether the instrument proposes a change which is legally important-that is, whether it proposes to amend existing law or make new law in a way which is significant
 - Whether the instrument is politically important-for instance, whether the Government is proposing a legislative change which involves a change in policy which merits further debate before it is approved
 - Whether a proposed change in legislation, taken together with other proposals, is significant enough to require further scrutiny

- Example of the process in action: see 9 September 2019 meeting –

<https://publications.parliament.uk/pa/cm201719/cmselect/cmestic/2266/226602.htm>

- Public engagement actively sought by the ESIC:
<https://www.parliament.uk/business/committees/committees-a-z/commons-select/european-statutory-instruments/public-engagement/>

Sunset clauses

- S8 powers expire 2 years beginning with exit day.
- S23 powers expire 10 years beginning with exit day.

Questions?

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Thank you for listening

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