

Secondary Legislation and EU Withdrawal

David Blundell

Introduction

- EUWA 2018 and EUWAA 2020: enormously important statutes
- EUWA 2018 (as enacted and as amended by EUWAA 2020) grants Ministers very broad delegated powers to amend existing primary and secondary legislation in consequence of the repeal of the ECA 1972
- Intended purpose – to ensure that the statute book functions ‘as normal’ after exit day
- But reality may be rather different: some early signs are of significant substantive legal and policy changes through secondary legislation
- And serious concerns over Parliamentary scrutiny

Scope of Talk

- Scope of this talk:
 - Give short contextual background to explain significance of secondary legislation “issue”
 - Summarise the key powers under the Acts to make secondary legislation
 - Explore some of key issues arising

Contextual Concerns (1): Overview

- 3 key concerns have been reported in discussion of the 2018 and 2020 Acts:
 - The volume of secondary legislation to be produced
 - The limited scrutiny to be applied to it
 - The vast use of Henry VIII powers

Contextual Concerns (2): Volume

- “In mere bulk, the child now dwarfs the parent” (Cecil T Carr, *Three Lectures*, CUP, 1921)
- Between June 2018 (Royal Assent for 2018 Act) and 9 April 2019, 528 Brexit-related SIs laid before Parliament

Contextual Concerns (3): Parliamentary Scrutiny

- Sheer volume means limited scope for scrutiny
- Between 1950 and 2015, 170,000 items of secondary legislation were laid before Parliament, but only 17 were voted down: 0.01%
- The last successful motion to annul a negative instrument in the House of Commons was in 1979 (Paraffin (Maximum Retail Prices) (Revocation) Order 1979)
- Debates on SIs described as ‘farcical,’ ‘an absolute joke’ and ‘a waste of time,’ and serving on such committees is seen as ‘punishment’ within a party: Fox and Blackwell, *The Devil is in the Detail*

Contextual Concerns (4): Henry VIII Powers

- Generally, the use of such powers have increased
- 9 examples prior to 1932: the Donoughmore Committee Report on Ministerial Powers
- Lord Rippon complained in 1989 of four in the previous parliamentary session alone (*Henry VIII clauses* (1989) 10 Statute Law Review 205).
- Lord Justice Judge identified over 100 in the session prior to 2010 (*Ceding Power to the Executive*, Lecture at KCL, 12 April 2014).
- The Hansard Society identified that between June 2018 (when the 2018 Act was given Royal Assent) and 8 April 2019, 130 of the 528 Brexit related statutory instruments laid included Henry VIII clauses

EUWA 2018: 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))

EUWA 2018: 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))

EUWA 2018: 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))

EUWAA 2020: Main powers exercisable by Regs (1)

- EUWAA 2020 inserts a host of new powers to make secondary legislation into the EUWA 2018. Thus:
 - Section 6(ba), (5A)-(5D) EUWA 2018: courts and tribunals not bound by retained EU case-law
 - Section 8A EUWA 2018: modifications relating to interpretation of EU-derived legislation under section 1B
 - Section 8B EUWA 2018: general power relating to implementation of Part 3 of Withdrawal Agreement
 - Section 8C EUWA 2018: implementation of Northern Ireland Protocol

EUWAA 2020: Main powers exercisable by Regs (2)

- Also creates Reg making powers of its own. Thus:
 - Sections 7-9, 12, 13, 14 EUWAA 2020: implementation of WA re: citizens rights, frontier workers, restrictions of rights of entry and residence, recognition of professional qualifications, social security coordination, non-discrimination
 - Section 11 EUWAA 2020: appeals and reviews relating to citizens' rights immigration decisions
- NB also Sch 4 on process

ISSUES

- The new Regulation-making powers raise a number of significant issues:
 - Scrutiny process
 - Henry VIII powers
 - Substantive scope of Regulations

Issue 1: Scrutiny Process (1)

- 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

Issue 1: Scrutiny Process (2), Powers (a)-(c) above

- Powers under: s8, s9 and 23 of the EUWA 2018
 - 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 Sch 7, 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

Issue 1: Scrutiny Process (3), the Sift

In summary:

- Minister must lay before both Houses a proposal including 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))

Issue 1: Scrutiny Process (4), the Sift

- 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)).

Issue 1: Scrutiny Process (5), the Sift

- 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 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
 - b) whether it otherwise merits being subject to the affirmative procedure

Issue 1: Scrutiny Process (6), the Sift

- 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

Issue 2: Henry VIII Powers (1)

- Very significant controversy over the scope of the regulation-making powers under both Acts
- In many cases, they include Henry VIII powers: the power to amend primary legislation by way of secondary legislation
- House of Lords Delegated Powers and Regulatory Reform Committee: “wider Henry VIII powers than we have ever seen”.
- Traditionally controversial because allows the Executive to amend the acts of the Legislature

Issue 2: Henry VIII Powers (2)

- Key power: section 8 EUWA 2018
 - “(1) A Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate –
 - (a) any failure of retained EU law to operate effectively or
 - (b) any other deficiency in retained EU law,
 arising from the withdrawal of the United Kingdom from the EU.”
- Subs (5): “Regulations under subsection (1) may make any provision that could be made by an Act of Parliament”: so no doubt about Henry VIII status
- NB: “appropriate”, not “necessary”: very wide power indeed

Issue 2: Henry VIII Powers (3)

- There appear to be 2 main limits on the scope of s8(1):
 - Definition of “Deficiencies in retained EU law” in subs (2)
 - Express limitations in subs (7)

Issue 2: Henry VIII Powers (4)

“Deficiencies in retained EU law are where the Minister considers that retained EU law—

(a) contains anything which has no practical application in relation to the United Kingdom or any part of it or is otherwise redundant or substantially redundant,

(b) confers functions on, or in relation to, EU entities which no longer have functions in that respect under EU law in relation to the United Kingdom or any part of it,

(c) makes provision for, or in connection with, reciprocal arrangements between—

(i) the United Kingdom or any part of it or a public authority in the United Kingdom, and

(ii) the EU, an EU entity, a member State or a public authority in a member State,

which no longer exist or are no longer appropriate,

(d) makes provision for, or in connection with, other arrangements which—

(i) involve the EU, an EU entity, a member State or a public authority in a member State, or

(ii) are otherwise dependent upon the United Kingdom's membership of the EU,

and which no longer exist or are no longer appropriate,

(e) makes provision for, or in connection with, any reciprocal or other arrangements not falling within paragraph (c) or (d) which no longer exist, or are no longer appropriate, as a result of the United Kingdom ceasing to be a party to any of the EU Treaties,

(f) does not contain any functions or restrictions which—

(i) were in an EU directive and in force immediately before exit day (including any power to make EU tertiary legislation), and

(ii) it is appropriate to retain, or

(g) contains EU references which are no longer appropriate.”

Issue 2: Henry VIII Powers (5)

- At first sight, subs (2) is a limited list
- But see also subs (3):
 - “There is also a deficiency in retained EU law where the Minister considers that there is—
 - (a) anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2), or
 - (b) a deficiency in retained EU law of a kind described, or provided for, in regulations made by a Minister of the Crown.”
- Broad residual power

Issue 2: Henry VIII Powers (6)

- But see limits in subs (7):

“But regulations under subsection (1) may not—

(a) impose or increase taxation or fees,

(b) make retrospective provision,

(c) create a relevant criminal offence,

(d) establish a public authority,

(e) be made to implement the withdrawal agreement,

(f) amend, repeal or revoke the Human Rights Act 1998 or any subordinate legislation made under it, or

(g) amend or repeal the Scotland Act 1998, the Government of Wales Act 2006 or the Northern Ireland Act 1998 (unless the regulations are made by virtue of paragraph 21(b) of Schedule 7 to this Act or are amending or repealing any provision of those Acts which modifies another enactment).”

Issue 2: Henry VIII Powers (7)

- See also:
 - Subs (4): no deficiency merely because does not contain any modification of EU law which is adopted or notified, comes into force or only applies on or after exit day
 - Subs (8): sunset clause, 2 years from exit day (cf. s23(4), 10 year sunset clause)

Issue 3: Substantive Scope of Regulations (1)

- When the 2018 Bill was passing through Parliament, the Government stressed that it was not “a vehicle for policy change”
- Instead, the intention was said to be to give the necessary power to correct or remove the laws that would otherwise not function properly once post-Exit
- But reality has already seen many of the Regulations under s8 effect significant legal change

Issue 3: Substantive Scope of Regulations (2)

- This has already been the subject of commentary: see e.g. Professor Joe Tomlinson on the UK Constitutional Law Association website
- 2 key forms of substantive change:
 - Deletion: e.g. Immigration, Nationality and Asylum (EU Exit) Regulations 2019 – delete swathes of EU immigration law including the Dublin III Regulation
 - Weakening of standards: e.g. regulations relating to Mad Cow Disease, plant protection / pesticides and animal imports all removed substantive existing EU standards (education checks, bans on certain pesticides and tests) – all re-instated after criticisms
- Recall: “appropriate” not “necessary” in s8(1)...

Litigation: some final thoughts...

- Section 8 likely to lead to a lot of litigation: *vires* challenges
- On the one hand, the *vires* is very wide: “appropriate” not “necessary”
- But the Courts are wary of Henry VIII powers: “a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach”: *R (Public Law Project) v. Lord Chancellor*
- The *PLP* case represents a more muscular approach – cf. earlier cases such as *Nottinghamshire CC v. SSE*. And clear that SIs can be challenged on a wide range of grounds. A good potential test of the Courts’ modern approach

Thank you for listening

© Copyright Landmark Chambers 2020

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
🌐 Landmark Chambers