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Scrutiny of Delegated Legislation in the EU "Withdrawal Agreement Bill"(WAB)

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Global Research, October 27, 2019
UK Constitutional Law Association 24 October 2019

Region: Europe
Theme: Law and Justice

In this post, I make a preliminary attempt at assessing the provision made in the EU (Withdrawal Agreement) Bill – or WAB – for the scrutiny of the legislative powers which it delegates to the executive. My conclusions are not positive. The scrutiny procedures it seeks to enact are inadequate – so inadequate that it would be a constitutional mistake for Parliament to approve this aspect of the WAB without significant amendment. At the very least (or so I suggest) the Bill ought to be amended to incorporate the so-called "sifting process" developed for equivalent delegated powers under the European Union (Withdrawal) Act 2018 (EUWA). Better still, this should be seen as an opportunity to embrace further incremental improvements on that process.

The scrutiny provisions in the WAB are comparable to – indeed they are partly modelled on – the arrangements initially proposed for delegated legislation under EUWA as originally published. But in that original form, those proposals did not survive parliamentary scrutiny. They were widely condemned as an inappropriate transfer of power to the executive, emphatically criticised by multiple parliamentary committee inquiries, and ultimately amended. In other words, the scrutiny arrangements in WAB are an attempt to revisit an approach to scrutinising delegated legislation which Parliament has already recently rejected and amended. Enacting them would be a regrettable step backwards in terms of scrutiny of executive legislative activity, and would contradict the considered Parliamentary verdict on this issue elaborated during the passage of the 2018 Act.

At the time of writing, the government's first programme motion – which proposed an extremely compressed timetable for scrutiny of the Bill – has been rejected by the House of Commons. But it remains government policy to pursue an extremely fast passage through Parliament for the WAB, certainly fast enough to inhibit thorough scrutiny of its proposals. With that accelerated context in mind, this post is not comprehensive – I generalise a little, I omit discussion of some important delegations and some nuances, I necessarily speculate on the full substantive importance of some clauses, and I have undoubtedly missed things (particularly but not exclusively connections between various aspects of the overall scheme in the Bill).

Still, the structure of the key elements of the Bill's approach to delegated legislation is relatively clear. Alongside many discrete delegations (which I do not discuss here) two significant bundles of delegations can be discerned. All of the powers in each of these two bundles are "Henry VIII" powers – i.e. they extend to the amendment of primary legislation. And moreover (because they each rely on the definition of "enactment" in clause 37) all are *prospective* Henry VIII clauses. That is, these two main bundles of delegated powers in the

WAB both empower the executive to amend primary legislation, including primary legislation passed *after* the passage of the WAB itself.

The first group, which I will call the Implementation Powers, consists of provisions concerning the domestic regulation of the Implementation Period. These take the form of insertions by the WAB into EUWA (in particular new sections 8A, 8B and 8C, which themselves take effect alongside and can be used to moderate the application of new sections 7A and 7B). Now, the substantive scope of the first two of these powers is not necessarily clear on the face of the Act. Section 8A would empower the executive to modify how provisions of EU law (saved from the repeal of the ECA by section 1A) are read in domestic law. And Section 8B empowers the executive to implement Part 3 of the Withdrawal Agreement, that is the "Separation Provisions" concerning the winding down of the application of EU law in the domestic legal order and the disentanglement at the end of the implantation period, including the regulation of the continued circulation of goods placed on the market before separation, ongoing customs procedures, taxation, intellectual property and police cooperation. It is hard to confidently anticipate the possible uses of this kind of power. This substantive opacity of these delegations is comparable to the similar characteristic of EUWA s8. And as the use of s8 for a remarkably broad range of policy interventions has demonstrated, this kind of substantively opaque delegation has the potential for staggering scope (for discussion and examples, see here and here). It would be unwise to assume that these powers are tightly constrained by the Treaty they are designed to implement and sensible to anticipate that as the substantive scope of s8A and s8B emerges, they will have the potential to be used in similar ways, and with similar range, to the s8 power. On the other hand, Section 8C is a remarkable clause whose substantive potential is plain on its face – it delegates to the executive essentially full authority over the implementation of the Northern Ireland Protocol. Proper scrutiny of that task – which has been at the heart of negotiations throughout, and whose resolution remains delicate – is fundamental to the legitimacy of the withdrawal process.

The scrutiny requirements for the exercise of these Implementation Powers are – consistent with the existing logic of the EUWA – inserted into Schedule 7 of that Act. Schedule 7's existing provisions famously (following the amendments secured in Parliament during that Act's passage) include the "sifting mechanism" through which dedicated committees (in each House) can recommend that some statutory instruments which would otherwise be subject only to negative procedures be upgraded to affirmative procedures. Whilst those recommendations are not binding, they have generally been followed by the government. And the institutionalisation of that process has resulted in the development of a parliamentary practice of case-by-case reflection on the appropriate scrutiny level for different instances of delegated legislation and an increasingly sensitive engagement with the underlying question of what kinds of delegated legislation ought to be subject to what kinds of scrutiny. Unfortunately, the WAB's insertion into Schedule 7 of scrutiny requirements for the Implementation Powers does not tie into this sifting mechanism. Instead, it simply repeats precisely the approach which Parliament had previously judged inadequate. The scrutiny requirements for each of ss8A, 8B and 8C are organised around the simple formulaic presumption (which appears again and again, not just here but throughout the WAB) that instruments be subject to negative procedures unless they amend primary legislation (or, roughly equivalent, what is known in the withdrawal scheme as "principal EU legislation"). That is, the use of these powers as Henry VIII powers is the primary trigger for affirmative parliamentary scrutiny. But this is a problematic presumption – the use of delegated powers to amend primary legislation is, of course, an important

activity which needs proper scrutiny. But the prominence of this presumption risks masking the – often equally significant – uses to which delegated legislation can be put without altering primary legislation. Some other specific substantive uses of these powers do also trigger affirmative scrutiny – in particular, 8C (the NI protocol implementation power) cannot be used to reform public authorities, impose fees, create new criminal offences, create legislative powers, or modify market access rules without parliamentary approval. But the bulk of legislative activity under these clauses will, under the scheme as published, be subject only to negative procedures in Parliament. In summary: 8A, 8B, and 8C empower the executive to legislate with significant scope in important policy areas, and a substantial proportion of exercises of those power – certainly much higher than under comparable delegations in the EUWA – will not be subject to affirmative scrutiny in Parliament and cannot be upgraded to undergo such scrutiny.

The second significant group of delegated powers, which I will call the Citizens' Rights powers, are created in WAB clauses 7-14. They empower the executive to implement the whole range of provisions in the Withdrawal Agreement for citizens' rights including residence, entry, frontier workers, recognition of professional qualifications, social security coordination, discrimination and employment rights, and the creation and administration of appeals or review mechanisms against some decisions taken in those contexts. In contrast to the Implementation Powers, this bundle is far from opaque. The substantive significance of this delegation of legislative power is plain to see; it covers essentially the entirety of one of the broadest, most sensitive and most important policy areas in the withdrawal process. And, again, whilst they are undoubtedly subject to some constraints in that they are limited to the implementation of the Withdrawal Agreement, they clearly empower extensive intervention by the government.

The scrutiny requirements for these Citizens' Rights powers are set out in WAB Schedule 6. They follow the same formulaic pattern that we saw applied to the Implementation Powers above: the starting point is that their use as Henry VIII powers is subject to affirmative scrutiny. The first uses of each of the cl.7-9 powers (which need not be far-reaching) are also subject to affirmative scrutiny. But other and subsequent exercises of these powers (which certainly could be far-reaching) will be subject only to negative scrutiny, again with no provision made for any mechanism to upgrade the scrutiny given to negative instruments.

The WAB's provisions for the scrutiny of delegated legislative power are, then, consistently arranged around an inadequate formulaic approach, which guards mainly against the abuse of delegated powers as Henry VIII clauses, but (due to the limitations of the prevailing negative procedures) leaves most other exercises of these powers essentially unscrutinised. Furthermore, the combination of formulaic criteria with the absence of a sifting mechanism means that the allocation of scrutiny mechanisms to these powers is wholly inflexible – no provision is made to enable the upgrading to affirmative procedures of significant exercises of the delegated powers which would otherwise be subject only to annulment; and it would in effect require subsequent primary legislation to introduce any such flexibility into the scheme. The range of policy areas to be subjected to this inflexible and inadequate framework – and thus left to the executive shielded from effective Parliamentary scrutiny – is extremely broad. On its face, it encompasses two of the most significant policy arenas of the whole withdrawal process, the Northern Ireland protocol and Citizens' Rights. And the Implementation Powers will undoubtedly be used to legislate in other important policy areas.

What amendments ought to be made is, however, an awkward problem given that time pressures are suppressing the usual institutional mechanisms for exploring this kind of problem and carefully proposing alternative approaches. In normal circumstances (and using the passage of EUWA as a guide) this issue would be tackled, drawing on a wide range of expertise, by multiple parliamentary committees, likely including (in the House of Commons) the Procedure Committee and (in the House of Lords) the Constitution Committee and the Delegated Powers and Regulatory Reform Committee. And the committees involved in the sifting process under EUWA – the European Statutory Instruments Committee and the Secondary Legislation Scrutiny Committee in the Commons and Lords respectively – might also take the opportunity to share their experiences with that scheme. The probable bypassing of this aspect of the normal legislative process on the WAB is a startling illustration of the scrutiny gap between this Bill and more typically timetabled legislation.

On the substance, the starting point for amendments on this issue must be an acknowledgement that under-scrutiny of delegated legislation is a standing problem in the UK constitution. Accordingly, statutes delegating significant substantive powers to legislate (like the WAB, but also more generally) should incrementally innovate in order to improve the situation. Yet as published, the WAB proposes a step backwards. And even the sifting process in EUWA represented only modest progress. On the one hand, section 8 instruments are among the best scrutinised in the UK constitution. But on the other hand, experience has shown that there are still important (but in principle avoidable) limitations on the effectiveness of even that scrutiny process: far-reaching policy changes are still subject to little or no proper scrutiny even under the sifting mechanism. So at the very least, WAB should maintain the standards set in EUWA: the provisions on scrutiny of the Implementation Powers and the Citizen's Rights powers should be amended in order to bring legislation made under those powers into the regime of the sifting mechanism. On further examination, this is likely also to be the case for other powers which I have not covered here. Ideally, amendments would go further still, in the light of the experience of that sifting mechanism. In particular, consideration should be given to making the recommendations of the sifting committees binding (or perhaps, at the very least, more difficult to circumvent) and to ways of enabling them to prompt better informed and more far-reaching debate (where appropriate) on the floor of the House.

The scale of the withdrawal process makes large scale delegation inevitable; its very nature entails a shift of authority towards the executive. This issue needs careful management – yet the approach to scrutiny taken in the WAB is wholly unsatisfactory. It was rejected by Parliament last time it was proposed. It should be rejected again in favour of more intrusive scrutiny techniques.

I am grateful to Mike Gordon, Alexandra Sinclair and Joe Tomlinson who generously commented on earlier drafts of this post at – obviously – very short notice.

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