



The Law Society

EUROPEAN UNION (WITHDRAWAL) BILL

THE BAR COUNCIL AND THE LAW SOCIETY JOINT DRAFT AMENDMENT TO CLAUSE 6: TREATMENT OF POST-EXIT JUDGMENTS OF THE EUROPEAN COURT

February 2018

Background

1. Subsections (1)(a) and (2) of Clause 6 give decisions of the European Court made after exit a restricted status. UK courts and tribunals will not be bound by those decisions, or the principles they lay down. They “need not” have regard to anything done by the European Court or any other EU entity, but “may do so” if considered appropriate.

2. The Bar Council and Law Society, in our separate briefings on the Bill ahead of Second Reading in the Commons, expressed concern that these provisions as drafted could lead to unacceptable uncertainty. We recommended that the House in Committee should remove Clause 6(2) and amend Clause 6(1)(a). Since then many commentators – including members of the senior judiciary – have added their voices to those troubled by these provisions in their present form. In the light of comments made since our original briefing, the Bar Council and Law Society now jointly recommend a slightly different amendment to Clause 6(1)(a). Along with the removal of Clause 6(2), the proposed amendment is designed to address the following issues:

2.1 At present the reader has to get to the end of Clause 6(2), after a series of negatively-worded provisions, to learn that a court or tribunal may take post-exit decisions etc. into account. To avoid confusion, that statement should appear at the beginning of this set of provisions.

2.2 There is a potential clash with Clause 6(3)(a). That provision requires a UK court or tribunal, after exit day, to apply (not just “take into account”) “retained general principles of EU law” when determining the “validity, meaning and effect” of any unmodified retained EU law. A post-exit European Court decision may well explain or interpret “general principles of EU law” as they stood on exit day. So

Clause 6(1) should operate without prejudice to Clause 6(3)(a) (and to paragraph 2 of Schedule 1, which will require a court to distinguish between new general principles laid down after exit day and a decision elucidating pre-existing general principles).

Draft amendments

3. We invite Members and Peers to:

A) Amend Clause 6(1)(a) to read as follows (added text shown in *italics*):

“(a) without prejudice to subsection (3) and paragraph 2 of Schedule 1 may take into account, but is not bound by, any principles laid down, or any decisions made, on or after exit day in respect of EU law by the European Court or another EU entity, and”

B) Delete Clause 6(2)

4. The effect of the amendments is to resolve the above points. The amended paragraph (a) emphasises that a court or tribunal may take into account post-exit decisions or principles, but is not bound by them; and that this is without prejudice to subsection (3) and paragraph 2 of Schedule 1, which may require a court or tribunal to apply a post-exit decision of the Court in certain circumstances.

5. The phrase “another EU entity” is incorporated into paragraph (a) from subsection (2). This would cover, for example, interpretative communications by the Commission that cast light on the meaning of a pre-exit item of EU legislation. We do not consider it necessary to replicate the words “or the EU” from subsection (2) because that adds nothing to the concept of an “EU entity” – anything said or done on behalf of the EU always emanates from the relevant entity of the EU.

6. The added words “in respect of EU law” make clear that this provision is concerned with the law applied in courts and tribunals, not other matters. Questions of fact in courts and tribunals will continue to be governed by the ordinary rules about admissibility and relevance of evidence, which these provisions do not affect.

Other issues

7. Two other issues were canvassed by the earlier Law Society and Bar Council papers:

7.1 Whether Courts should be required rather than permitted to take account of rulings of the European Court on issues of EU law, consistently with the approach taken to rulings of the Court of Human Rights under the Human Rights Act 1998.

7.2 Whether rulings of the European Court on issues of EU law should be treated as issues of fact rather than law after UK withdrawal, given that EU law would become 'foreign law' after the UK ceases to be a Member State, and the preliminary ruling procedure will no longer be available in UK court proceedings.

8. These are important issues but they have not been included as positive proposals for two essential reasons:

8.1 The first issue appears to us to be an essentially political rather than legal issue;

8.2 On the second issue, given the extent of effective incorporation that is provided for in Clauses 2-4 of the Bill, we can see that there could be practical difficulties in treating rulings of the European Court on points of EU law in the same way as rulings of other foreign courts relevant to UK proceedings.

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