

WHAT'S (OR WHAT'S NOT) IN THE JOHNSON DRAFT WITHDRAWAL AGREEMENT BILL?

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The European Union (Withdrawal Agreement) Bill (“WAB”) is (to put it mildly) a web of complexity.

To read it properly, you need to have open at the same time:

- the EUWA 2018
- the EUWA 2019
- the EC 1972 Act
- the front half of Mrs May’s Withdrawal Agreement
- the new Northern Ireland Protocol
- the new Political Declaration
- the EU Treaties
- the EEA/EFTA Separation Agreement
- the UK Swiss Agreement
- CRAGA 2010, devolved legislation and copious EU Regulations and Directives that are being carried across during the Implementation Period.
- On top of that you need a fair understanding of the affirmative and negative procedures for delegated legislation².

In addition, the WAB itself is a labyrinth – important provisions are scattered across its various Parts and Schedules in the places you would least expect them... so careful reading of the small print is essential. There are no shortcuts - this is not legislation that can be rushed through.

Here is a precis of my working notes...(with apologies for the yawn factor but the devil is in the detail)...

1. **Retention of Supremacy of EU law:** The EUWA 2018 and 2019 repeals the 1972 Act with effect from exit day (whenever that is to be). Clause 1 WAB then reinstates the 1972 Act for the implementation period (“IP”) and confirms the supremacy and consistent interpretation of EU law until December 2020. Section 1 is an “as if” mirror clause - the UK is effectively treated “as if” it were still a Member State. This means:
 - a. The UK still has to comply with all incoming EU laws (including new Regulations and Directives) and comply with rulings from the CJEU in the meantime.
 - b. These laws will then become UK retained law after the end of the IP – see Clause 25.
 - c. There are a number of EU initiatives coming onstream e.g. services passport for SMEs, collective redress class actions for consumers. If their transposition deadline falls within the IP, they will be hardwired into the UK statute book once we leave.
 - d. Even if the implementation deadlines fall after the end of the IP, the EU Select Committee can raise a motion before House of Commons regarding new EU legislation that is of vital interest to UK (Clause 29). So the UK can conform with, or diverge from, new EU initiatives.

¹Views expressed are my own and not those of Chambers – any errors are my own.

²See for starters, <https://www.parliament.uk/about/how/laws/secondary-legislation/statutory-instruments-commons/#jump-link-0> and the linked flow charts.

2. **Withdrawal from the Single Market and EEA/EFTA:** The WAB implements the **EEA/EFTA separation agreement** which was agreed at the international level by the UK and Norway, Iceland and Liechtenstein in December 2018. It is not clear whether that treaty has been laid before Parliament yet and received formal approval by Parliament under CRAJA. If not, then the WAB acts as Parliamentary approval at domestic level to take the UK out of the EEA and Single Market. It is not clear how that process is reconciled with the international law requirement in Article 127 of the EEA Agreement to serve 12 months' written notice to terminate the EEA Treaty (akin to notice under Article 50 TEU)..
3. **Parliamentary Sovereignty:** **Clause 36 in Part V makes a bold proclamation that “nothing in this Act derogates from the sovereignty of the Parliament of the United Kingdom.”. That itself is an unusual clause to find strewn randomly on page 41/115. It begs the question why such a clause is necessary in the first place.** The clause is framed in terms as though the continued application of EU law during the IP is a threat to the supremacy of Parliament. On closer inspection, you might be forgiven for thinking there might be other reasons for concern...
4. **Henry VIII Clauses:** There are scattered references throughout the WAB conferring broad powers on the Minister and devolved authorities to implement delegated or secondary legislation. **The scope of those powers is extremely broad – just a broad subjective discretion on the Minister to “make such provisions as he considers appropriate”.** In many instances there are no limits (like those included in the EUWA 2018) on the exercise of the power such as preventing retroactive application of the law, creation of criminal offences or tax implications, establishment of new authorities or time limited powers.

The mechanics for Parliamentary approval are set out in Schedule 5. However, whether the particular SI is to be passed by the affirmative or negative resolution procedure is not clear. You need to read the Explanatory Memorandum closely. Also **Schedule 5 is not complete and silent in some respects. In some cases, it appears that the House of Lords has been written out of the process altogether and its role is reduced to observing the motion in the House of Commons without its own separate power to approve or oppose.**

Why is that important? The type of resolution procedure determines the extent and intensity of Parliamentary scrutiny³. To be clear, neither delegated procedure ensures full Parliamentary scrutiny which is why the use of Henry VII powers is so contentious.

- Under the **affirmative procedure**, the draft SI is scrutinised by Committee to ensure it is legal and does not go beyond the powers specified in the parent Act. A motion must be laid before the House of Commons and the House of Lords and approved before the SI becomes law. Normally (save for financial SIs) approval by **both** Houses is necessary. It is extremely rare for affirmative SIs to be rejected – the last time the HC objected was in 1978.
- Under the **negative procedure**, there is no need for positive approval just the absence of objections within a set period (a minimum of 21 days but normally 40 days).

³ For more information, see <https://researchbriefings.files.parliament.uk/documents/SN06509/SN06509.pdf>

Here's a snapshot of the Henry VIII powers in the WAB:

Clauses	Subject matter	Discretionary	Limits	Approval procedure
3 - 6	Power to amend the application of EU law in particular cases	Yes	No	Not clear
7 - 9	Power to implement citizens' rights in WA, EEA-EFTA Separation Agreement and Swiss Agreement and residence status.	Yes	No	Affirmative where powers amend or repeal or revoke primary legislation or retained direct principal EU legislation Role of HL not clear
7,8 or 9	Citizens' rights: <ul style="list-style-type: none"> • Entry and residence rights • Healthcare rights of entry • Deportation • Treatment of criminals 	Yes	No	Other powers (where no amendments to primary legislation) apply negative resolution procedure NB These provisions all seem to refer to new UK immigration scheme which has not yet been seen or approved – MPs are being asked to approve in the blind without seeing the whole picture
38	Power to disband the newly established Independent Monitoring Authority for Citizens' Rights or remove its powers (in full or part)	Yes	Necessity	Affirmative procedure Power to modify primary legislation by deleting relevant provisions in the WAB (once enacted)
12-14	Implement WA provisions (including supplementary provisions) regarding: <ul style="list-style-type: none"> • Professional qualifications (Clause 12) • Social security (Clause 13) • Employment rights and self-employed rights (Clause 14) 	Yes	No	Affirmative procedure Wide powers to amend primary legislation and create public authorities and delegate powers to them.
18-19	Broad powers for Minister and devolved authorities to make provisions (as appropriate) for "separation issues".	Yes	Yes Clause 18 and s.8B(5) impose similar restrictions to EUWA 2018	Not clear – no mention in Schedule 5 or Explanatory Memorandum. Very broad range of issues covered here – includes goods, customs, VAT, data, trademarks, patents, criminal procedure

Clauses	Subject matter	Discretionary	Limits	Approval procedure
				(including Arrest Warrant), judicial cooperation in civil matters, public procurement, Euratom, UK's involvement in EU administrative and judicial procedures.
21	Powers to implement the NI Protocol	Yes	No	Limited Parliamentary scrutiny although these provisions will have financial implications. Includes powers to make provisions that would normally be in an Act of Parliament.
30	Extension of the Implementation Period beyond December 2020	Yes	Approved by UK with EU in Joint Committee	Negative resolution Role of HL approval shortened to 5 sitting days
39	Broad powers for Minister to issue regulations to make <i>"such provision as the Minister considers appropriate in consequence of this Act."</i>			
Paragraph 1(3) and (5) of Schedule 6	"Mass deferral" powers to introduce a gloss so that exit Sis and legislation do not enter into force until end of the IP	Yes		Where powers exercised before exit day, there is no procedure at all. Where powers exercised on or after exit day, the regulations will be subject to the negative procedure.

Why all the fuss?

Basically, if Parliamentary scrutiny is reduced, then the only control over the exercise of Henry VIII powers is left to the Courts via judicial review. The Courts will intervene to check delegated legislation is within the parameters of the powers conferred – the broader the power – the closer the judicial scrutiny. **However, that process is dependent upon individuals taking the initiative (and bearing the costs risk) of litigation.**

The Admin court is reluctant to interfere with matters of policy and, unless there is clear illegality, shows broad deference for discretion – with a high threshold of irrationality. Relief may be limited – the claimant may overturn the measure and require it to be taken again but the claim will not necessarily result in a positive remedy such as reinstatement of their individual rights or damages.

5. **Mechanics for Negotiating the Future Trade Agreement (FTA): Strangely, the mechanics for the negotiation of the FTA find themselves buried halfway through an innocuous sub- clause on page 34 of the WAB.** Clauses 31 to 32 of the WAB deletes the mechanisms introduced as part of the Grieve amendments in s.13 EUWA 2018.
- a. Clauses 31 and 32 insert negotiating parameters – the Minister must lay a “statement of objectives” (SoO) before the House of Commons within 30 days of exit, which set out the negotiating objectives and which must be consistent with the PD. The House of Commons must approve the SOO by motion.
 - b. Minister can revise the SoO at any point and submit for approval – so freedom to depart from the terms of the PD that has been approved in principle by Parliament.
 - c. Minister must lay progress report to HC at end of each 6 month reporting period and confirm that the eventual FTA will be consistent with latest SoO. If it diverges, the Minister must explain why – the Act is silent as to what MPs will do if there is a divergence or if they withhold their approval of the revised SoO or progress report.
 - d. Presumably, if Parliament objects to the course of negotiations, that will raise the spectre of the UK leaving without a deal by the end of December 2020.
 - e. The WAB is silent as to what should happen in the event that the Government *fails to negotiate a final FTA*. In that event, the UK will again face the prospect of no deal in December 2020. There are no mechanics for Parliament to step in and give instructions about the next steps that it wants to the Executive to follow.
6. **Ratifying the FTA: Most importantly, Clause 33 bypasses the constitutional protections in s.20 CRAGA which require that new treaties must be laid before Parliament before their ratification and allow a period of 21 sitting days for either House to raise objections to ratification. Put simply, although the WAB gives Parliament some oversight over the negotiating process, the WAB does away with Parliamentary approval of the final terms of the FTA**

So:

- a. If a FTA is concluded with the EU, the Minister must inform Parliament and lay a copy of the concluded FTA before both Houses. Parliament’s role is simply to ratify the concluded agreement – by approving the motion before the House of Commons.
- b. Note that the role of the House of Lords is severely curtailed – the HL can approve the concluded FTA within 14 days. If they do not approve or raise objections, the Minister can override their views and insist on ratification regardless.

In effect, this means that the supervisory role of the House of Lords has been emptied of all constitutional significance and the balance of powers between Legislator and Executive has been completely redrawn.

It is not clear how this sits with the *Miller I* judgment, whereby the “Queen in Parliament” means both House of Parliament acting as the senior partner and the Executive as the junior partner is not clear....

There is no mention of any involvement of the devolved legislature in that process either...

7. **Employment rights:** Clause 34 introduces new s 18A into EUWA to prevent the regression of workers' rights. All sounds good... until you digest the detail in Schedule 5A. Like EUWA 2018, what the Act gives, the Schedules take away...
- a. **Clause 1 of Schedule 5A requires the Minister to make a statement to the House before it lays any draft Bill involving workers' rights that EU derived employment rights have not been watered down. However, Clause 1(b) continues that, even if the SS is unable to make that statement, he can ask the House to proceed with the Bill anyway....**
 - b. Similarly, Clause 1 requires the Minister to consult with workers representatives and trade unions before he makes that statement but Clause 1(5) removes that requirement where consultation is not practicable...
8. So far as new EU employment rights are concerned, as part of the 6 monthly reporting requirements, the Minister has to submit a "non divergence report" to House of Commons. That means he has to confirm that UK law in essence provides the same level of protection Clause 2(3) of Schedule 5A. If UK law is not going to keep pace, then the Minister has to make a statement about what the Government intends to do (Clause 2(4)).
- Note that there is no positive requirement for the Government to replicate new EU employment rights – The Government just has to indicate its intended course of action (which may amount to a "do nothing" option). That report must be approved by motion by both HC and HL but it is not clear what happens if either House withhold their approval.
9. **There is therefore no guarantee that UK employment rights will keep track with EU employment protections going forwards.** By way of example, the Commission has recently launched proposals to introduce transparent and predictable working conditions for "gig economy" workers (such as those on zero-hours contracts or in domestic employment). It is also planning additional protections for airline crew and pilots. There are also new commitments in the pipeline to protect workers from violence and harassment at work.
- The EU is also progressing the Pillar of Social Rights to provide additional protections for workers with wide ranging standards for minimum wages, work-life balance, equal opportunities, access to training and lifelong learning, pensions, affordable childcare, flexible working and parental leave⁴. **There is therefore large scope for divergence where UK employees may lose out on employment benefits, compared to their European counterparts.**
10. Clause 4 helpfully sets out 5 pages of EU employment legislation that is to be protected but then Clause 4(2) provides another Henry VIII power where the Secretary of State can modify the list of EU directives as he sees fit in the light of any changes in EU directives relating to workers' rights. Conceivably that could be used to *supplement* the extent of workers' rights; the realities of that happening in a right wing government may be non-existent. That clause can also be used to ensure that post-exit day changes are not carried across into the UK statute book. **It means that the Government can override existing and new EU employment rights without proper scrutiny or control by Parliament.**
11. **Other European rights:** The emphasis on non-regression of workers' rights throws into juxtaposition, **the absence of any reference to other EU rights and standards, such as environmental protections, consumer protection, data and privacy, disability and health**

⁴ see https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights/european-pillar-social-rights-20-principles_en.

protection. Whilst the UK/Swiss Agreement protects the self-employed and service providers, there is no mention of any such rights for UK citizens that trade in the EEA on a self-employed basis.

Conclusion

12. The WAB may technically be in limbo but, even when it is released from purgatory, its passage will be far from serene. We can expect multiple challenges and amendments and its journey will take much longer than the truncated 2-3 day period allocated under the Government's timetable. **Our constitutional wrangles are very far from over....**