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POLICY MAKING THROUGH THE BACK DOOR – SPOTTING ISSUES AND CHALLENGING BREXIT-RELATED SIS

31 January 2020 | London
Legal Briefings

With the European Union (Withdrawal Agreement) Act 2020 (**the Withdrawal Agreement Act**) now formally on the statute books, Britain is set to exit the EU at the end of January. Exit day, however, only marks the next step in the Brexit process. The UK will enter into a transition period until 31 December 2020, during which time the UK and the EU will seek to negotiate a trade deal.

Meanwhile, work is continuing to fill the gaps in the UK's legislative landscape following Brexit in accordance with the scheme laid down in the European Union (Withdrawal) Act 2018 (the **Withdrawal Act**). These gaps are largely being filled through statutory instruments (SIs) rather than primary legislation. Research by the Public Law Project as part of its Statutory Instruments: Filtering and Tracking (**SIFT**) project suggests that a total of nearly 1000 SIs will have been laid down by exit day. Introducing secondary legislation is undoubtedly quicker and administratively easier for law makers, and in most cases the legislation will go no further than is permitted by the Withdrawal Act, as amended by the Withdrawal Agreement Act. Brexit-related Statutory SIs may, however, provide cause for concern for businesses and individuals if there is a risk that SIs are being used to introduce significant legal and policy changes.

WHAT ARE STATUTORY INSTRUMENTS?

The power to make an SI is usually conferred on a Minister through an Act of Parliament, and the Minister is then able to make law on the matters identified in the relevant Act. SIs typically do not go through the same Parliamentary scrutiny as Acts of Parliament. Some SIs are subject to the "affirmative procedure", which means that they are scrutinised by the Joint Committee on Statutory Instruments (**JCSI**), and then approved by both Houses before being signed by a Minister. However, the majority of SIs in Parliament are laid under the "negative procedure", by which they become law (after the JCSI scrutinises them) on the day the Minister signs them, and automatically remain law unless a motion to reject the SI is agreed by either House within 40 sitting days. Such a motion has not been agreed in the House of Commons since 1979 and in the House of Lords since 2000. Additionally, there is now a European Statutory Instruments Committee (**ESIC**) in the Commons. The ESIC 'sifts' through Brexit-related SIs and can recommend that a different procedure be used to make a particular SI. The Secondary Legislation Scrutiny Committee (**SLSC**) is tasked with a similar sifting exercise in the House of Lords. However, there remain concerns around whether this sifting process is effective (and in any case, it does not apply where a Minister makes a declaration of urgency).

In the context of Brexit, sweepingly broad powers have been given to the executive under the Withdrawal Act to make regulations in order to ensure that the law functions as normal on exit day. Section 8 of the Withdrawal Act gives ministers the power to "make any provision that could be made by an Act of Parliament" to "prevent, remedy or mitigate" any failure of retained EU law to operate effectively, or any other deficiency in retained EU law, arising from the withdrawal of the UK from the EU. Additionally, the Withdrawal Agreement Act inserts a number of new powers into the Withdrawal Act – including powers under a new section 8A to modify any provision made by or under an enactment for purposes connected with the arrangements for a transitional period. Further, the so-called "Henry VIII power" to amend primary legislation via secondary legislation (which has been subject to considerable criticism) has been extended to Ministers for use in a number of other contexts.

POSSIBLE IMPACT

Brexit is a period of exceptional legislative change and challenge. There is therefore a chance that the body of SIs being introduced is not entirely cohesive and joined up. There is also a risk that new SIs are introduced which go further than was envisaged in the primary legislation whilst, in practice, being subject to little or no scrutiny by Parliament.

This is not merely an academic issue. SIs that have been introduced or proposed in the lead up to exit day cover a wide range of topics including cross-border taxation, pharmaceutical testing, financial services, energy regulation, and environmental protections. Often, they contain the nuts and bolts of the regulatory framework that primary legislation does not cover, and deal with complex technical topics that only businesses and experts may fully be able to understand and analyse. Consequently, unless businesses are vigilant, there is a risk that the raft of SIs introduced could inadvertently bring in new obligations on businesses through the back door or fundamentally alter the regulatory landscape.

For instance, the Cross-border Trade (Public Notices) (EU Exit) Regulations 2019 were laid and would have empowered officials to amend VAT or customs and excise law by public notice following Brexit. These regulations would have represented a fundamental shift in tax law in the UK as it would have equipped Treasury officials with the power to amend the law simply by giving public notice. However, HMRC were forced to back down and revoke this SI following the threat of legal action.

On the other hand, the suite of SIs dealing with the financial services sector have been the subject of extensive consultation involving both the financial regulators and the affected institutions as well as lawyers operating in the relevant area, in a way which reduces the risk of legislative overreach.

SPOTTING ISSUES AND CHALLENGING SIS

The HMRC example shows why it would be prudent for businesses to keep a close eye on SIs relevant to their industry or sector and to engage with the relevant government department directly, or through a trade association on the contents of such legislation.

Courts do not generally have the power to strike down Acts of Parliament save in EU law cases (and there could be a "declaration of incompatibility" in Human Rights Act cases). However, the position is different for statutory instruments as they can be challenged on administrative law grounds and potentially struck down. For example, the Supreme Court recently reaffirmed the position that secondary legislation is subordinate to the requirements of an Act of Parliament (*RR v Secretary of State for Work and Pensions* [2019] UKSC 52).[1]There is therefore scope for challenging SIs if they are *ultra vires* i.e. where they go beyond the scope of the power conferred by the relevant Act of Parliament.

In the Brexit context, it is important to note that the legislative purpose underpinning section 8 and the new section 8A of the Withdrawal Agreement is to plug legislative gaps and fix deficiencies following Brexit, and not to introduce new policies. Consequently, any SIs that introduce wider policy changes could be open to challenge. There may also be other substantive grounds to challenge SIs. For example:

- If its provisions contravene the European Convention on Human Rights (**ECHR**);
- If it can be demonstrated that the SI is irrational; or
- If irrelevant considerations were taken into account, or relevant considerations not taken into account, when the SI was made.

There is also the possibility that an SI could introduce new wording that is open to interpretation. While the wording itself might on its face be interpreted as being within the scope of the Withdrawal Act powers given to Ministers, the Government could in the future interpret such wording in a way that could be considered to be beyond such powers. The English Courts have not yet had occasion to fully set out how it would deal with such situations. However, in an early challenge against three separate Brexit-related SIs (*R on the application of Client Earth and anr v Secretary of State for Environment, Food and Rural Affairs* [2019] EWHC 2682 (Admin)), the High Court indicated that challenges could in theory be brought against "*a specific future decision*" relying on the terms of an SI.

In any event, a decision to challenge an SI (or an act of the Government relying on the terms of an SI) will have to be taken swiftly. Applications for judicial review must be made promptly and, in any event, within three months of the relevant decision. It is therefore essential for businesses and organisations to take immediate legal advice to consider whether an SI throws up concerns, whether it can be challenged by way of judicial review, and if so, how and when to bring such a challenge.

CONCLUSION

The Government's use of SIs to fill legislative gaps is understandable. That being said, there remains a concern that SIs could introduce wider legal and policy changes. In the circumstances, it is important for businesses and their advisers to monitor whether these SIs impact their operations (or, indeed, whether they could impact their operations in the future). If there is a risk of that happening, businesses should consider whether seeking the court's oversight via judicial review proceedings is necessary.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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