



European Scrutiny Committee

House of Commons London SW1A 0AA

Tel (020) 7219 5465/3292 Email escom@parliament.uk Website www.parliament.uk/escom

From: Sir William Cash MP

19 December 2017

The Rt Hon Theresa May MP
Prime Minister
10 Downing Street
London SW1A 2AA

European Union (Withdrawal) Bill: Disapplication of Primary Legislation

The European Scrutiny Committee have asked me to write to you concerning the provisions of this Bill giving the UK courts a power to disapply pre-exit UK primary legislation. This ability of the courts to do this is currently only found as a consequence of our membership of the European Union and therefore needs careful consideration in the context of the UK's departure from the EU. A contrast can be made between the approach of this Bill and that of the Human Rights Act 1998 which has given greater recognition to Parliamentary sovereignty.

The power to disapply primary legislation is not strictly circumscribed in the Bill. As currently drafted there are significant areas of uncertainty, and significant discretion is given to the courts, without providing them with further guidance. Fears have already been expressed that the courts will be dragged into the political arena by the Bill.

The power to disapply pre-exit primary legislation derives from clause 5 which, at paragraph (2), expressly provides that the principle of supremacy of EU law continues to apply "so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day." The following considerations illustrate the breadth and uncertainty of this provision:

- "The principle of supremacy of EU law" is not defined in the Bill and its extent is sufficiently uncertain to have given rise to significant jurisprudence in other Member States. The UK Supreme Court itself has in recent years been considering this issue in cases such as *HS2* and *Pham* although it has not delivered a binding judgment on the subject.
- The power to disapply primary legislation only applies to any pre-exit enactment, not just to retained EU law. The recent *Benkharbouche* case is a reminder of the reach of the principle of supremacy of EU law; in this case the UK disapplied a

statute which was on its face far removed from EU law, namely the State Immunity Act 1978.

- Nevertheless the breadth of retained EU law introduces further uncertainty because (as explained in the Government's Factsheet on Converting and Preserving Law) where there is conflict between pre-exit domestic law and retained EU law the principle of supremacy will give precedence to the latter. EU retained law is defined very broadly¹ and includes subordinate legislation, and there will be no catalogue of it.
- This power to disapply primary legislation applies "so far as relevant", thus introducing a broad discretion. To illustrate; paragraph 96 of the Government's Explanatory Notes to the Bill suggest that these words may be used by the courts to disregard the principle of supremacy in relation to legislation made in preparation for the UK's exit from the EU, although there is nothing in the Bill itself making this explicit.

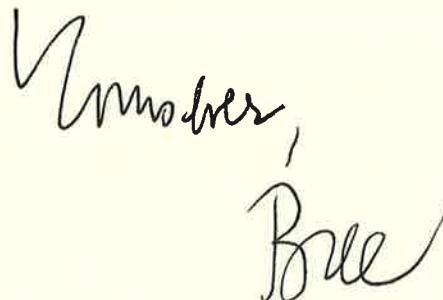
The position is exacerbated by clause 6 of the Bill. Notably, paragraph (2) gives the courts a discretion (without further guidance) to take into account post-exit judgments of the Court of Justice. This provision has been criticised on broader grounds but, in this particular context, could lead to the courts following a post-exit CJEU judgment with the consequence that primary legislation is disapplied when this would not otherwise have happened.

We appreciate that in accordance with the Bill it would be possible for Parliament, after exit, to pass primary legislation overturning any decision of a domestic court to disapply pre-exit primary legislation. However this would appear to be a burdensome fall-back position, going further than the Human Rights Act, particularly if the Bill indeed creates unnecessary uncertainty, including by the discretion it leaves to the courts.

My Committee therefore requests that you to clarify the Government's position on the matters raised in this letter and set out what the Government intends to do to address them. We should be grateful to receive your response by Monday 8 January 2018 in order that we might consider it before the report stage of the Bill."

I am copying this letter to David Davis, Secretary of State for Exiting the European Union; Jeremy White, Attorney General; Lord Boswell, Chair of the European Union Committee in the House of Lords; and Hillary Benn, Chair of the Exiting the European Union Committee.

CHAIRMAN



The image shows a handwritten signature in black ink, which appears to be 'W. Andrews, B. Benn'. The signature is written in a cursive style and is positioned to the right of the printed name 'CHAIRMAN'.

¹ Clause 2 defines EU-derived domestic legislation as, ultimately, UK legislation relating to the EU or the EEA; clause 4 is, by nature, a sweeping up provision.