The Bar European Group

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Henry VIII Powers in The European Union (Future Relationship) Act 2020

By Fergus Randolph QC, 30 December 2020[1]

The European Union (Future Relationship) Bill ["**the Bill**"] is about to receive Royal Assent and become The European Union (Future Relationship) Act 2020. The Bill – 80 pages – and the Explanatory Notes thereto – 77 pages – were published by the Government less than 24 hours before Parliament started to debate its contents. One of the first decisions taken by the Commons Speaker was to confirm that there would be no time to debate any amendments to the Bill. Accordingly, the only issue for Parliament was whether there should be an act or not. Given that the Bill was seeking to implement the EU-UK Trade and Cooperation Agreement ["**the TCA**"], finalised on Christmas Eve, which agreement was described by the Prime Minister in the Government's summary thereof as being one which "*changes the basis of our relationship with our European neighbours from EU law to free trade and friendly cooperation*", one might have thought that time would have been found to debate the Bill properly. As is well-known, the European Parliament is taking its time to do exactly that, and the TCA itself allows for its provisional application prior to ratification.

The position would be more palatable if the Bill were simply a technical instrument to implement the TCA. However, the Bill seeks to do more by enlarging once again the might of the Executive through either executive fiat or by use of the ubiquitous Henry VIII powers.

Thus, section 29 of the Bill will have the effect, <u>without more</u>, of blessing *inter alia* all future relationship agreements. Such agreements are defined as including "*any supplementing agreement or any agreement under, or otherwise envisaged (whether as part of particular arrangements or otherwise) by, an agreement falling within … [inter alia] the Trade and Cooperation Agreement.*"[2]

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1 This paper which has been prepared for BEG reflects the views of the author and any expression of opinion should not be taken to reflect the views of all BEG members.

2 'Supplementing agreement' is defined as being one constituted as such by Article COMPROV.2 of the TCA, which provides as follows: "*1. Where the Union and the United Kingdom conclude other bilateral agreements between them,*

As Professor King of UCL has noted, the provision can be translated in the following terms: "We don't know what changes to the law are in fact required by this EU-UK agreement, but whatever they are, Parliament by operation of this clause makes them effective from the date this law comes into force." As Professor King further notes "this is deeply unsatisfactory, arguably worse that broad delegated powers that entail some parliamentary scrutiny."

Which brings one neatly onto Henry VIII. Section 31(1) provides as follows:

"*A relevant national authority*[3] *may by regulations make such provision as the relevant national authority considers appropriate (a) to implement the Trade and Cooperation Agreement, the Nuclear Coooperation Agreement, the Security of Classified Information Agreement or any relevant agreement, or (b) otherwise for the purposes of dealing with matters arising out of, or related to, the Trade and Cooperation Agreement, the Nuclear Coooperation Agreement, the Security of Classified Information Agreement or any relevant agreement.*"

Section 31(2) provides that "*Regulations under this section may make any provision that could be made by an Act of Parliament (including modifying this Act).*"

As helpfully identified in the Explanatory Notes, the scrutiny procedures for such regulations is set out in Schedule 5 to the Bill. Paragraph 6 thereof provides that regulations[4] made on or after 31 December 2020 "*may not be made unless a draft of the instrument has been laid before, and approved by resolution of, each House of Parliament.*" – i.e. the draft affirmative resolution procedure. However, there are exceptions to this. First, those regulations not falling within the ambit of paragraph 6(2) of Schedule 5 can be made by way of a negative resolution procedure (or the equivalent thereof in the devolved administrations).[5] However, where such regulations are to be made within two years of the end of the transition period (11pm GMT on 31 December 2020), then the negative resolution procedure may only be used where the relevant Minister or other relevant devolved authority has made a statement in writing to the effect that in the Minister's opinion the instrument should be subject to such negative resolution procedure[6] and that either the relevant committees of both Houses of Parliament have each made recommendations as to the appropriate procedure or that the relevant period has ended without such recommendations being made.[7]

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such agreements shall constitute supplementing agreements to this Agreement, unless otherwise provided for in those agreements. Such supplementing agreements shall be an integral part of the overall bilateral relations as governed by this Agreement and shall form part of the overall framework. 2. Paragraph 1 shall also apply to agreements between the Union and its Member States, on the one part, and the United Kingdom, on the other part …"

3 Defined as comprising *inter alios* a Minister of the Crown.

4 Which amend, repeal or revoke primary legislation or retained direct principal EU legislation or create a power to legislate – see paragraph 6(2) of Schedule 5.

5 See paragraph 6(3) of Schedule 5.

6 See eg paragraph 8(3) of Schedule 5.

7 'Relevant period' is defined in paragraph 8(10) of Schedule 5.

Secondly, under paragraphs 14-17 of the Schedule, in so-called "urgent cases", where a Minister of the Crown or equivalent other relevant devolved authority declares that "*by reason of urgency, it is necessary to make the regulations without a draft being laid and approved*",[8] then the 'made affirmatiuve resolution procedure' will be applicable, whereby regulations can come into force without being debated but cannot remain in force unless approved by both Houses within 28 days.

As again noted by Professor King, section 31 of the Bill (as read with Schedule 5 thereto) "means that such powers can be used to create tertiary legislation (ie designate someone to make new legislation not subject to any parliamentary scrutiny) and permit the amendment of the Future Relationship Bill/Act itself if regarded by ministers as necessary to implement." As he continues with some degree of understatement, both of those features were "quite controversial" when the EU (Withdrawal) Act 2018 was passed.

In conclusion, given the UK's dualist legal system, it was always going to be necessary to incorporate the terms of the TCA into domestic law by legislation. However, what the Bill does is to go well beyond that, by giving the Executive a whole fresh suite of powers to exercise without any or any proper Parliamentary scrutiny.

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8 See eg paragraph 14(2) of Schedule 5.