PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fifth Delegated Legislation Committee

DRAFT ELECTRICITY AND GAS (POWERS TO MAKE SUBORDINATE LEGISLATION) (AMENDMENT) (EU EXIT) REGULATIONS 2018

Thursday 1 November 2018

No proofs can be supplied. Corrections that Members suggest for the final version of the report should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

Monday 5 November 2018

The Committee consisted of the following Members:

Chair: Sir David Crausby

† Bryant, Chris *(Rhondda)* (Lab)
† Charalambous, Bambos *(Enfield, Southgate)* (Lab)
† Evennett, Sir David *(Bexleyheath and Crayford)* (Con)
† Freeman, George *(Mid Norfolk)* (Con)
† Green, Chris *(Bolton West)* (Con)
† Harris, Rebecca *(Lord Commissioner of Her Majesty's Treasury)*
† Hayes, Mr John *(South Holland and The Deepings)* (Con)
† Hendry, Drew *(Inverness, Nairn, Badenoch and Strathspey)* (SNP)
† Huq, Dr Rupa *(Ealing Central and Acton)* (Lab)
† Jones, Susan Elan *(Clwyd South)* (Lab)
† Moore, Damien *(Southport)* (Con)
† O'Brien, Neil *(Harborough)* (Con)
† Perry, Claire *(Minister for Energy and Clean Growth)*
† Smith, Nick *(Blaenau Gwent)* (Lab)
† Smith, Royston *(Southampton, Itchen)* (Con)
† Whitehead, Dr Alan *(Southampton, Test)* (Lab)
† Zeichner, Daniel *(Cambridge)* (Lab)

Ian Bradshaw, *Committee Clerk*

† attended the Committee

Fifth Delegated Legislation Committee

Thursday 1 November 2018

[Sir David Crausby *in the Chair*]

Draft Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018

11.30 am

The Minister for Energy and Clean Growth (Claire Perry): I beg to move,

That the Committee has considered the draft Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018.

It is a pleasure to serve under your chairmanship, Sir David. The regulations were laid before the House on 5 September. They are part of a package of measures that we promised to introduce to carry forward what we said in the European Union (Withdrawal) Act 2018, incorporating relevant EU legislation into domestic law and ensuring that Ministers have the proper powers to act under the legislation.

The legislation we are discussing today is part of the third energy package. Much of this is very technical—it is known as the European network codes and guidelines. As promised, the European Union (Withdrawal) Act will incorporate the majority of that legislation into domestic law.

The instrument before us will ensure that relevant legislation works effectively in two ways after our departure from the European Union. First, it will ensure that directly applicable EU law concerning electricity and gas is effectively incorporated into domestic law. Secondly, it will confer powers on the UK Government and Northern Ireland Executive to amend elements of that retained EU law, should we wish to do so.

The instrument will transfer legislative functions conferred by four regulations to our UK Government and the Northern Ireland Executive under section 8 of the withdrawal Act, and I will turn now to those four powers.

The first power is the incorporation of provisions of network codes into UK law. This provides a limited ability, essentially, to create European network codes. The withdrawal Act says that we will incorporate all direct EU legislation

"so far as operative immediately before exit day".

That means, of course, that we are not future-proofing for provisions that are enforced on exit day but that do not apply until a later date. That will be the case for several European network codes, so without the transfer of the power, gaps in the energy regulatory framework could be created. It is therefore important that we can incorporate the missing provisions promptly through legislation. That is accomplished by part 2 of the instrument, which substitutes limited powers for the Secretary of State and the Northern Ireland Department for the Economy to make regulations, bringing into domestic law provisions corresponding to the codes, or parts of the codes, not captured by the withdrawal Act, and revokes the European Commission's powers to make new codes. The statutory instruments, should we use them, will be subject to affirmative procedures to ensure that they are scrutinised effectively.

The second power is to amend network codes. It enables us to transfer powers currently held by the European Commission to the Secretary of State and the Northern Ireland Department. Again, those powers would be exercised using affirmative statutory instruments.

Power three is to amend the regulation on wholesale energy market integrity and transparency—REMIT—and the reporting requirements. The instrument transfers to the Secretary of State and the Northern Ireland Department powers to amend definitions and reporting requirements under REMIT. This is an important, albeit technical, code because it prohibits insider trading and market manipulation in wholesale energy markets, and provides existing energy regulations with tools to fight those crimes. The power to amend the definitions is limited and can be used only to ensure coherence with other relevant financial activities and energy legislation, or to take into account developments in wholesale energy markets.

The fourth, very important, power is the security of gas supply regulation, which creates common standards and indicators to measure threats to gas security, and defines how much gas is needed to maintain security of supply. Quite an interesting document is produced at regular intervals that sets out the definitions of gas security and risk assessment for the relevant group of European countries. The regulation transposing it into EU legislation contains templates for risk assessments, preventative action plans and emergency action plans to be carried out by Governments. It currently contains powers for the European Commission to amend the templates using delegated Acts. This instrument will transfer those powers to the Secretary of State, and they would be exercised if required through subsequent negative statutory instruments. We believe that is appropriate, as the powers permit only very narrow amendments to very limited provisions of the regulation.

The instrument applies to Northern Ireland. It transfers powers variously to the Secretary of State and the Department for the Economy in Northern Ireland, respecting the devolution settlement. Of course, we have consulted extensively with the Northern Ireland Department during the development of this process.

The instrument allows the Secretary of State to exercise powers in respect of Northern Ireland, but that would occur only in respect of a reserved area, such as international relations or where the Department for the Economy determines that, as is currently the case, it is unable to act in the absence of Northern Ireland Ministers. Should that power be used, it will be accompanied each time by ministerial statements explaining why it is necessary.

Although deeply technical in nature, these regulations are, as we have promised, a sensible, proportionate and necessary transfer into domestic law of powers currently applicable to our markets and delivered under EU law. This will maximise continuity in our energy regulation as we leave the EU. I therefore commend these regulations to the House.

11.36 am

Dr Alan Whitehead (Southampton, Test) (Lab): It is a pleasure to serve under your chairmanship, Sir David.

I will not rehash in detail the function of this statutory instrument. In her comprehensive speech, the Minister gave us a good landscape of what the measures do. Essentially, they are part of the ongoing process of establishing EU network codes and guidelines through the third energy package in member state and UK legislation. As she says, some of those guidelines are completely in UK legislation; some are in UK legislation but have not yet become active; and some are in neither category. Clearly, there is a position where a number of those codes will no longer be completed on EU exit. That includes arrangements relating to networks in a number of other areas as well.

That process is not particularly in dispute. The question is rather more about what needs to be done at the point of exit to make sure the process is as smooth as possible. The procedure that has been chosen in this SI to do that is a little strange. I note that the SI did not fall foul of the Joint Committee on Statutory Instruments and came through without reference. However, I would point out that the structure of the SI, which is a secondary piece of legislation, enables the Secretary of State to make further secondary legislation on the back of the first bit of secondary legislation. To my mind, that is a deeply unsatisfactory way of making legislation.

The Minister assures us that changes would be made in the form of affirmative SIs and would therefore be debated in this Chamber. She is obviously fully aware that those are not amendable, so we would, effectively, have a process outside primary legislation, where the Secretary of State would make regulations and the most that could happen is that we would have a debate and raise our concerns, but that would be it.

The question is how those new regulations would be advanced, with what kind of discussion and through what authorities. There is nothing on the face of this SI that indicates how arrangements would be undertaken. It says merely that the Secretary of State can make regulations in the absence of the continuing implantation in UK legislation of the EU network codes and guidelines procedure, and effectively place this within a GB remit, but clearly there is rather a lot more to it than that.

It is a question of what has happened already in terms of those EU network codes and guidelines being established in UK legislation. That has been done, for example, through extensive discussion with industry and the long-established joint European stakeholder group. There is no mention of that procedure and how it would work as far as these arrangements are concerned; there is merely the idea that the Secretary of State can do these things because he or she can. The construction of the legislation is pretty unsatisfactory in terms of how the procedure will work.

The first question for the Minister is therefore whether she is satisfied that the SI, as it stands, tells the whole story about the UK's implementation of these arrangements for the future, or does she intend to bring forward a further SI that clarifies them and creates a more rounded and satisfactory arrangement for the future?

The second issue is the status of these changes. Are they, in the form of an SI, contingent measures that—depending on what negotiations are undertaken with the EU as regards not only exit day but the transition period that follows—might fall should we not arrive at suitable negotiated arrangements, such as continuing membership of, or close association with, the internal energy market? If there is continued membership of the internal energy market or close association with it, my understanding is that these changes will not be necessary. Indeed, a note sent out by Ofgem to all interested stakeholders in July 2018 stated:

> "Our initial conclusion was that we had found nothing in the current licence conditions that would appear to become inoperable on exit day".

On the SIs that relate to changing those operating terms, Ofgem said:

> "The terms of those Statutory Instruments depend on the outcome of the UK-EU negotiations. Those Statutory Instruments will amend the law that governs the regulation of our licences and so the specific changes to our licences cannot be finalised until it is clear how the law that they operate under is changed."

Chris Green (Bolton West) (Con): In the post-EU relationship that we are looking forward to, is the hon. Gentleman concerned more about the relationship between the United Kingdom and France on the undersea interconnectors or about the energy market on the island of Ireland, where there is that common framework?

Dr Whitehead: The hon. Gentleman slightly anticipates one or two things that I will say, particularly about Northern Ireland. There is substantial concern about that issue, and it ought to be addressed through the SI, but I do not think it is.

The hon. Gentleman rightly raises the issue of how interconnection will work when there are different codes at each end of the interconnector. I do not think that makes a great deal of difference to the interconnector's efficient operation. I have other concerns about interconnectors and the UK's relationship with the EU once we are not a member of it, but that is not an issue for today.

As far as the relationship with France is concerned, we must look at that in the wider context of how we will operate the arrangements that are already under way, such as the internal energy market and the Trans European Replacement Reserves Exchange—Project TERRE—which is an EU-wide, inter-country balancing mechanism that would be under severe strain if there were not a negotiated agreement to allow those arrangements to continue.

I thank the hon. Gentleman for his intervention, because it brings me to my next point. Ofgem concluded that

> "any necessary licence and industry code modifications can only be fully implemented once the changes to retained EU legislation have taken effect in GB law…We consider that the potential changes identified in our initial analysis are likely to be straightforward, seeking to remedy any technical deficiencies arising from EU exit, and as such would not justify the use of an SCR"—

a significant code review. Has the Minister had discussions with Ofgem about its original position? Has its original position changed and, if so, how?

Ofgem appears to be telling us that, although it would be a nice idea to have made these changes by exit day, they are not essential to the running of the market, with one exception. Therefore, does this SI signify an intention to have no further negotiations with the EU about the internal energy market and things such as

[Dr Whitehead]

Project TERRE? Does it represent the end of the intention to negotiate further and place into law things that make a clear break with the current arrangements? Or will the Minister clarify whether, like a number of the pieces of secondary legislation relating to Euratom, these are purely contingency devices that can be set aside if new arrangements come forward to continue the relationship?

Chris Green: My understanding is that it is very much along the lines of the legislation that the Department for Transport has prepared. It is preparation in case, but there is no expectation that it will be applied. Does the hon. Gentleman read it similarly?

Dr Whitehead: Again, I am grateful for the hon. Gentleman's intervention, inasmuch as I am not sure which way I read this. There is certainly nothing in the SI to guide me clearly, whereas there has been in legislation, including secondary legislation, relating to membership of Euratom, for example. At the very least, I would hope that the Minister could clarify the position substantially; ideally—this would be a rather better idea—we would have an SI that set that out.

Another question follows on from the issue of whether this is a contingent break or an actual break with existing arrangements. If it is an actual break, what authorities are likely to be involved in implementing additional SIs to bring into UK legislation European legislation that is, as the Minister said, halfway in and halfway out? Would it be National Grid? Would it be Ofgem? Who would it be? At the moment, there is nothing in the SI to indicate what arrangements there would be—it says just that the Minister would be able to do these things.

I am reassured a little that the procedure would be affirmative, but there is nothing to guide us on how things would happen; indeed, Energy UK has raised concerns about how the arrangements would work. I mentioned the long-established joint European stakeholder group. Would that be the vehicle under which new SIs were looked at and agreed? What arrangements, other than "The Secretary of State can just do it," would there be to allow for a satisfactory and transport procedure in the future? It is very unsatisfactory that we do not have that sort of guidance in this SI.

The final point I would like to raise is about Northern Ireland. Of course I understand that we are making legislation at the moment in the absence of a Northern Ireland Executive, but the position, if these changes are made by Parliament here in the absence of that Northern Ireland Executive, is that, on exit day, we would have one grid in Ireland running on two codes. The code for Northern Ireland would be clearly distinct on exit day, inasmuch as we are seeking by this SI to repeal all those pieces of EU legislation that may complete their passage through to UK legislation in the long term. Therefore, this is not a question of contingency, long-term considerations or otherwise; it is a fact that, on exit day, that will be the situation with EirGrid.

That is a matter of some concern, inasmuch as we would at the very least need assurances that it would not, in itself, undermine the integrity of EirGrid in the future, and that the difference in codes would not mean, metaphorically, that a gentleman would have to arrive at the border with a large pair of bolt cutters and snip the link to make sure that we were integral as far as codes and arrangements were concerned. I sincerely hope that nothing like that would happen, but it is clearly a matter for considerable further negotiations. There is a big question mark against whether we have jumped the gun in terms of those negotiations by putting these issues into practice here in the UK Parliament.

To summarise the Opposition's concerns, we find this SI pretty unsatisfactory on a number of grounds. However, we understand that it is probably necessary to do a number of the things that it does as we move towards exit day. As the Minister is aware, there are no circumstances under which we can amend secondary legislation. What I would like to have done was to table an amendment to clarify some of these points. I therefore think we will have to signify that we are not happy with the SI and that we would prefer it to be written in another way by not supporting it this morning. That does not mean that we do not understand why a number of these things are taking place.

It would be good to hear from the Minister a specific response to the points that I have raised, to clarify why this SI is necessary right now, what its purpose will be and how that purpose can best be undertaken in the future—things I would like to have seen on the face of the SI. It may be that light can be shed on those things this morning in a way that causes us not to vote against it to indicate our displeasure. I trust the Minister will understand the position we are in, and I hope that one way or another—whether by the institution of a further SI or by further correspondence—we can clear up a number of these matters.

11.57 am

Drew Hendry (Inverness, Nairn, Badenoch and Strathspey) (SNP): It is a pleasure to serve under your chairmanship this morning, Sir David.

The Minister, with her usual aplomb, in a well-presented technical exposition of what is in front of us this morning, asked us to accept that everything will be okay if we just leave it at that. I do not intend to cover all the ground that has already been covered, and I will try to be much quicker and perhaps a little blunter in expressing my feelings about what is in front of us.

This is not just a technical matter; it represents another Henry VIII power grab, following the Brexit power grab. We have concerns about giving UK Ministers the right to amend EU energy transparency rules through the negative procedure. REMIT creates a very important framework for identifying and penalising market abuse in the UK and across Europe. That helps consumers, industry and other active participants to have confidence that wholesale energy prices are open, fair and competitive and are the foundations of an effectively functioning energy market. It is of paramount importance that those transparency rules can be changed only with full transparency. That should therefore require the positive procedure.

This is just another example of how Brexit will entail a loss of transparency and scrutiny. The proliferation of these extra bits of Brexit red tape belies a Government unprepared for Brexit. Brexit is creating more red tape, unlike what we were promised. It is totally unacceptable that Ministers expect us to hand over more powers when we have been very clear that, in our view, the powers that are already held by Ministers are not being used to benefit Scotland.

For example, nothing has been done on regulating off-grid heating oil and gas. Nothing has been done to challenge the extra unit price that people in the highlands and islands pay for their electricity. Nothing has been done, as we heard from the hon. Member for West Aberdeenshire and Kincardine (Andrew Bowie) yesterday, for oil and gas in the North sea. To quote him exactly, he said:

"Exactly; we have done nothing."—[*Official Report*, 31 October 2018; Vol. 648, c. 987.]

Why would we want to hand more unsupervised powers to the UK Government? I am afraid we have to reject that proposition.

12 pm

Claire Perry: As most Members here voted to trigger article 50 and begin a process of—*[Interruption.]* Well, most of us voted to trigger it, and most of our constituents would have expected us to do so, as we live in a democracy. My point is that, in the process of bringing forward the Brexit that our country voted for, we must ensure that there is a smooth and orderly transposition of EU law—the acquis—into UK law so we can exercise proper scrutiny of the sorts of powers that we are referring to. I believe it is called taking back control and exercising parliamentary sovereignty.

I commend my officials in the Department for Business, Energy and Industrial Strategy, the Clerks and the Panel of Chairs, because we will all be troubling them a lot over the next few months as we do what people expect us to do—transfer the powers to ensure that there is absolutely no break in the continuity of activity. That is vital to ensure we have a smooth Brexit. In some cases, we will take contingency powers, in the very unlikely event that we have a disorderly Brexit, which would be deeply unpalatable.

Some of the speeches that have been made, including that of the hon. Member for Inverness, Nairn, Badenoch and Strathspey, encapsulated a whole other load of stuff relating to devolution and the transfer of additional powers to the UK Government. I have reminded him several times that his constituents, like all constituents in our very powerful united group of countries, have benefited from legislation such as the price cap Bill, and the enormous growth of the renewable industries in Scotland has happened with the help of subsidies brought about by the taxes and powers taken by this Government. I suspect it is in his constituents' interests to have as much alignment as possible with the Westminster Parliament on energy matters.

I should preface my remarks by saying that we will clearly have to prepare for a number of fractious Committees ahead if, in the process of introducing the legislation we have committed to, which is an attempt to transfer smoothly some very technical powers on day one, we try to turn this into a rerun of the referendum on Scottish independence, which was thankfully rejected, and the EU referendum.

The concerns of my opposite number, the hon. Member for Southampton, Test, were, as always, valid. He raised a number of issues. The first was what happens if there is no deal? Are we effectively putting things in place that we would have to change in a no-deal scenario? The answer is no. The regulations would be needed in all scenarios. They do not prejudge the outcome of the negotiations. They are designed to target a very limited set of legislative powers, which are held by the European Commission and would otherwise be left behind. They are helpful to our industry. Of course, it is entirely within our remit, once we have left the EU, to decide to change them completely.

One of the most important issues is how we consider gas security—a vital matter for us. It is entirely within Parliament's power to introduce additional legislation or regulations to create our own domestic view of what gas supply, and reporting and security measures, look like. Those are not Henry VIII powers; as is set out in these regulations, if we wanted to do something as broad as that, it would be for the Secretary of State to introduce it, and it would be subject to the normal legislative scrutiny. We have not had much chance to scrutinise the current regulations under the rather remote functioning of the European Commission.

If we enter into an implementation period, which I believe strongly is what we need, these transfer powers would not need to be exercised immediately, but they may still be needed after the implementation period. The hon. Gentleman referred to an Ofgem note; I hesitate to suggest that it was referring to a slightly different issue, but it was—it was referring to domestic licences that had been granted. It is quite proper for Ofgem to determine whether any amendments are needed for conditions of its licences, in both an EU exit scenario or any other scenario. That is a different issue from amending the EU's network codes and guidelines, which are currently directly applicable in the EU legislation.

Dr Whitehead: I am afraid I handed my copy of the Ofgem letter to *Hansard*, but my understanding of that letter is that although it relates primarily to domestic licences, there is reference to the European codes and what they represent. That is not surprising inasmuch as the European codes are intended to underpin domestic licences in any event. Therefore, what Ofgem said about whether those changes would be necessary on exit day relates to what is half in and half out of the legislation and what is completely in the legislation. That has a bearing on whether those changes are made immediately or at the end of negotiations.

Claire Perry: Again, I think we should all take comfort from that Ofgem letter, which suggests that the markets will operate smoothly, even without these changes. It is a prudent Government who ensure that we transpose relevant codes, as we said we would, where we believe there is a potential threat. We do not want to trouble a Committee in future months to make those changes; a potential change might come up as a result of the governance gap once we leave the EU.

The hon. Gentleman raised an important point about the single energy market in Northern Ireland, which is a critical element of ensuring that we have a smooth-functioning energy system. The substance of the codes created after exit day will be the same; these amendments are needed only to reflect the life of the UK outside the EU. This statutory instrument does not directly relate to the single energy market.

It is the same point with interconnectors: they work under access agreements, as the hon. Gentleman knows. There are already potential changes in elements of the

[Claire Perry]

markets on both sides of the interconnector. The amendments we are bringing forward do not materially affect any of those interconnector contracts—as he knows, they are commercial decisions that essentially flow when the price signal is right, rather than Government decisions to bring forward supply.

Dr Whitehead: The Minister is right to distinguish interconnection from integrated market arrangements. Other than a brief response to an intervention, I did not mention the question of interconnectors in this context. In EirGrid, what is in place is the integration of what were previously interconnections into a single seamless grid. The question is not the relationship between interconnectors in Northern Ireland and the Republic of Ireland, but the status of an entirely integrated single grid system that is different from an internal energy market, which is another matter that presumably we need to deal with in a different way. There is a specific question here of an interconnection arrangement transformed into a single network, and the relationship with sets of codes on either side of what is not a border at all as far as EirGrid is concerned.

Claire Perry: Allow me to remind the hon. Gentleman that we are talking about the existing set of network codes being transposed, and making provision for codes that have already been announced and will come into place post our departure date, to ensure that we do not end up with a different set of codes. It will be our sovereign decision, should we wish to change any aspects of our energy market. We would expect to do that in proper and full negotiation with our EU friends and partners or companies involved in that process. In a way, we are talking about ensuring there is complete continuity, because we are talking about codes that are already announced.

Dr Whitehead: This SI repeals those part codes.

Claire Perry: No, it does not repeal the part codes; it essentially suggests that we will bring into force those codes that are announced but not yet in place on exit day.

I have set out that the instrument is one of a very large number of SIs that my Department will introduce to ensure that we have a smooth and orderly departure and that we are fully prepared in the event of a no-deal scenario. I hope that we scrutinise those instruments adequately. However, the hon. Member for Southampton, Test asked me why we are not setting out the full legislative programme that we would want to engage in were we to change any element of the legislation. I am not aware of any piece of legislation we go through where we ask how we would subsequently debate it were we to decide to amend it in the future. Frankly, that is probably an ask too far, given that the House voted to trigger article 50 and to start the process.

My No. 1 focus is ensuring that we have a very smooth EU exit for our energy system, to maintain security of supply and low prices and to ensure that the price cap Bill applies. I appreciate the hon. Gentleman's frustration about being unable to amend the legislation, but if we are to re-run arguments about referendums and have arguments about how we might introduce future legislation when we are debating very technical and narrow changes to existing EU acquis being transposed into UK law, we are in for a very long and jolly autumn and winter. Of course, it would be a pleasure to share that with my friends on both sides of the House, but our constituents might not thank us for doing so. I commend the regulations to the House.

Question put.

The Committee divided: Ayes 9, Noes 8.

Division No. 1]

AYES

Evennett, rh Sir David	Moore, Damien
Freeman, George	O'Brien, Neil
Green, Chris	Perry, rh Claire
Harris, Rebecca	Smith, Royston
Hayes, rh Mr John	

NOES

Bryant, Chris	Jones, Susan Elan
Charalambous, Bambos	Smith, Nick
Hendry, Drew	Whitehead, Dr Alan
Huq, Dr Rupa	Zeichner, Daniel

Question accordingly agreed to.

Dr Whitehead: On a point of order, Sir David. I crave your indulgence in placing on the record that the explanatory memorandum states:

"It is therefore intended to revoke those provisions from exit day by regulations under section 8(1) of the Act. Those revocations will be made in a separate instrument."

To my reading, that indicates that where provisions are not entirely established, it is the Government's intention to revoke them and introduce a separate instrument amending them. That was the substance of the point that I made during the debate.

The Chair: That is not really a matter for the Chair, but it is noted.

Resolved,

That the Committee has considered the draft Electricity and Gas (Powers to Make Subordinate Legislation) (Amendment) (EU Exit) Regulations 2018.

12.14 pm

Committee rose.