PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Second Delegated Legislation Committee

DRAFT TAKEOVERS (AMENDMENT) (EU EXIT) REGULATIONS 2019

Tuesday 11 December 2018

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not later than

Saturday 15 December 2018

The Committee consisted of the following Members:

Chair: Ian Austin

† Afriyie, Adam *(Windsor)* (Con)
† Baron, Mr John *(Basildon and Billericay)* (Con)
† Esterson, Bill *(Sefton Central)* (Lab)
Evans, Chris *(Islwyn)* (Lab/Co-op)
Godsiff, Mr Roger *(Birmingham, Hall Green)* (Lab)
† Graham, Richard *(Gloucester)* (Con)
† Harris, Rebecca *(Lord Commissioner of Her Majesty's Treasury)*
Hendry, Drew *(Inverness, Nairn, Badenoch and Strathspey)* (SNP)
† Johnson, Diana *(Kingston upon Hull North)* (Lab)
† Mills, Nigel *(Amber Valley)* (Con)
† Morris, Anne Marie *(Newton Abbot)* (Con)
† O'Brien, Neil *(Harborough)* (Con)
Smith, Angela *(Penistone and Stocksbridge)* (Lab)
† Smith, Nick *(Blaenau Gwent)* (Lab)
† Tolhurst, Kelly *(Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy)*
† Walker, Thelma *(Colne Valley)* (Lab)
† Watling, Giles *(Clacton)* (Con)

Peter Stam, *Committee Clerk*

† attended the Committee

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[Ian Austin *in the Chair*]

Draft Takeovers (Amendment) (EU Exit) Regulations 2019

2.30 pm

The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Kelly Tolhurst): I beg to move,

That the Committee has considered the draft Takeovers (Amendment) (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship, Mr Austin. The regulations will be made under powers in the European Union (Withdrawal) Act 2018. They amend part 28 of the Companies Act 2006, so that the United Kingdom's corporate takeovers regime can operate independently in the event that the UK exits from the EU without a withdrawal agreement.

If the UK leaves the EU without an agreement in place, the instrument will provide legal clarity and certainty. The takeovers regime seeks to ensure that shareholders receive fair and equal treatment when the company in which they have invested is subject to a takeover bid. The effective operation of the takeovers regime is vital to business confidence.

Part 28 of the 2006 Act transposes the takeover directive 2004/25/EC into UK law. The directive was intended to harmonise certain aspects of takeover supervision across the European economic area. It created expectations of reasonable behaviour to which company shareholders could hold bidders. It also created a system of co-operation, in which member states' regulators shared jurisdiction over a small number of cross-border takeover cases.

The 2006 Act requires the Takeover Panel to make rules to give effect to the directive in the UK. The panel has done so in the City code on takeovers and mergers. The regulations preserve the statutory underpinning of the code, and make only minimal changes to the way in which the UK regime functions. In developing the regulations, we worked closely with the UK's supervisory authority, the Takeover Panel. The panel has published a consultation document on the changes that it will need to make the takeover code reflect the regulations.

The regulations make only three substantive changes to the way in which the UK takeovers regime functions. The rest of the regulations import and correct provisions from the directive that are necessary for the independent operation of the UK regime, but do not change how the domestic regime operates.

First, the EEA takeovers regime includes a system of shared jurisdiction for company headquarters that are listed in different countries. The supervision of a company captured by the shared jurisdiction system is usually done by two regulatory authorities: one in the country where the company has its registered office, and the other in the country where the company is listed. The shared jurisdiction regime ensures that there is clarity about which national takeover rules apply in such cases.

The shared jurisdiction regime works on a reciprocal basis. Since the UK will be outside that framework, the reciprocal arrangements will no longer apply after EU exit. The regulation will remove shared jurisdiction from the UK takeovers regime. The Act requires the panel to supervise UK companies with securities admitted to trading on a UK-regulated market. The panel may also choose to supervise companies that do not fall within that definition. The panel is currently consulting on the application of the takeover code in the light of the loss of the shared jurisdiction regime.

Nigel Mills (Amber Valley) (Con): Will the Minister clarify what would happen if a takeover started before exit day, but had not been completed, and there was a co-operation arrangement, with two jurisdictions reviewing the proposed takeover? Presumably, after exit day, only one would be allowed to review it. Would a whole new process have to be started, or would one authority effectively just give up its scrutiny of the takeover?

Kelly Tolhurst: I thank my hon. Friend for his intervention; he raises a very good point. Although the statutory instrument will remove the shared jurisdiction, part 28 of the 2006 Act still places a duty on the UK to co-operate with any country or territory on mergers. While the SI will remove the reference to the EEA, we will not remove the continued co-operation of the UK regime with other countries and territories.

The panel is currently consulting on the application of the takeover code in the light of the loss of the shared jurisdiction regime. It proposes to supervise takeovers concerning only companies that meet the residency criteria set out in the takeover code.

The second feature of the draft regulations relates to the duty to co-operate. Section 950 of the Companies Act places a general duty on the Takeover Panel to co-operate with its counterparts and certain other regulatory agencies in any country or territory outside the UK. It also imposes a specific duty to co-operate with supervisory authorities in the EEA, which is derived from the takeovers directive 2004. After our exit, EEA member states will no longer be bound to co-operate with the UK under the directive. The draft regulations will therefore remove the specific obligation to co-operate with EEA supervisory authorities, as it will no longer be reciprocal. However, the Takeover Panel will still be required to co-operate with the authorities of EEA member states under the broader duty to co-operate with any international supervisory authority with an equivalent role. This change will not, in practice, constrain the panel's ability to co-operate.

The final feature of the draft regulation relates to restrictions on the disclosure of confidential information. Section 948 of the Companies Act restricts the disclosure of confidential information obtained by the Takeover Panel during its duties and sets the conditions under which information can be shared. It applies to both the panel and the organisations with which information is shared. Breaching the section 948 restriction is a criminal offence.

The Companies Act provides an exemption from the section 948 restriction for EEA public bodies using confidential information disclosed by the panel for the purpose of pursuing an EU obligation. These EEA

public bodies are bound by their own national laws and by EU law to prevent the inappropriate disclosure of information passed to them by UK authorities. After our EU exit, these reciprocal protections will no longer apply to the UK. The draft regulation will remove the specific exemption from the section 948 offence for EEA public bodies and ensure that there is a sanction to deter inappropriate onward disclosure of sensitive information.

Mr John Baron (Basildon and Billericay) (Con): Just for clarity, once we leave the EU, will whatever duties there are on the UK to co-operate in a takeover situation be reciprocated by the EU, so that there is an element of co-operation on matters of this sort? In other words, will there be reciprocity across the divide?

Kelly Tolhurst: I thank my hon. Friend for his question. My understanding is that we are obviously bringing the EU regime as it stands into UK law, including the duty to co-operate with countries, and I expect that that will be the case.

Mr Baron: I thank the Minister; she is being very generous. I get that we will be taking EU law into UK law. We will co-operate, because we will have taken that legislation into our own, but I want clarity on whether the Minister is confident that there will be reciprocity when it comes to the EU co-operating with us? As the Minister well knows, takeovers can go both ways.

Kelly Tolhurst: It is my understanding that that will be the case. If I am incorrect, I will of course correct the record. As I have outlined, we currently have an obligation to co-operate, which is in the interests of those countries. However, we are talking about a small number of organisations that would fall under this requirement.

The regulations before the Committee are the product of close working with the Takeover Panel to provide a free-standing statutory underpinning for the UK takeover regime in the event of a no-deal exit. Corporate mergers and takeovers are an important part of a healthy economy. By encouraging efficiency gains, spreading knowledge and promoting innovation, they drive economic growth and job creation.

It is vital that we seek to safeguard the legal framework that gives companies and their shareholders the confidence to engage in merger and acquisition activity. The regulations achieve that goal by making only the changes needed to fix deficiencies in UK law arising from EU exit. They do not otherwise alter the operation of the UK's takeover regime. They will have a negligible overall net effect on our economy. I commend the regulations to the Committee.

2.41 pm

Bill Esterson (Sefton Central) (Lab): The Minister's remarks show that the prospect of no deal should be avoided at all costs for this reason alone; there are many other reasons for avoiding it, but let us explore the risks in the regulations.

The Minister talked about legal clarity and certainty, and referred to part 28 of the Companies Act 2006. However, the regulations move from a specific provision, covered by our relationships as part of the European Union, and of the EEA in particular, to general obligations in terms of international co-operation, the implication of which is that we move to a weaker takeover regulatory system.

The hon. Member for Amber Valley talked about what happens in the event of a takeover that straddles exit day and about how we guarantee continued co-operation before and after exit day from our EEA counterparts. The problem is that the duty to co-operate will no longer apply, as the Minister said.

The hon. Member for Basildon and Billericay asked an even more pertinent question on reciprocal arrangements, and I want to quote part of a letter the Minister wrote to the shadow Secretary of State, my hon. Friend the Member for Salford and Eccles (Rebecca Long Bailey):

> "At EU exit, however, EEA Member States will no longer be bound by a duty under EU law to cooperate with the UK. To leave section 950 of the Companies Act intact would therefore be to impose a duty on the Panel that is not reciprocated by supervisory authorities elsewhere in the EEA."

The hon. Member for Basildon and Billericay hit the nail on the head: we cannot guarantee that the supervisory arrangements will be in place from the EEA once we have left. That is a really important point that the Minister will need to address.

As with so many other areas of business dealings and the regulatory environment, there is a real problem. The UK domestic takeover regime will need to function outside the existing EU framework. My understanding is that it is fully integrated at the moment because of our EU membership, but that will no longer be the case. Perhaps the Minister can confirm exactly how it will operate, because her two hon. Friends have highlighted a very real problem regarding the current complexity. That complexity is pretty clear from paragraph 7.1 of the explanatory memorandum. That paragraph describes the consequential amendments required and demonstrates how many changes are needed to existing legislation in this country to disentangle us from the EU arrangements that we are party to at the moment. Perhaps the Minister can address that point and the apparent confusion between her remarks and what she said in the letter I quoted.

In addition, will the Minister talk about what will happen with takeovers that are across multiple jurisdictions? Can she tell us what preparations the Competition and Markets Authority has made? What will the experience of the existing and additional staff be? What qualifications will current and new staff have? How long does it take for staff to acquire the skills needed to supervise such arrangements adequately?

Coming back to the points made by the Minister's hon. Friends, who will regulate in cases where companies have a registered office in an EEA member state and trade their securities on the UK stock exchange? That is the point about multiple jurisdictions. The fact that a company is registered in an EEA state does not mean that we are not interested; if it is trading on our stock market, we have an enormous interest in ensuring that we supervise adequately.

I am afraid we are becoming rather used to an absence of impact assessments for the SIs we are discussing relating to no deal, which are coming thick and fast—one last week, and two this week that the Minister and I are dealing with. The explanatory memorandum states that

> "the impact on most businesses will be minimal",

[Bill Esterson]

so an impact assessment was not produced. However, it also says that 10 UK companies are affected by the regulations. Perhaps the Minister can tell the Committee how big those companies are and how significant they are for the UK economy. If they are sizeable companies, that is not an insignificant issue—and, let us face it, if they are involved in takeover activity, they are likely to be sizeable companies. That raises the question of why the Government have decided not to produce an impact assessment.

I mentioned the consequential amendments. Paragraph 7.14 of the explanatory memorandum speaks of a duty of co-operation. EEA member state bodies will have no duty, and we will have no duty, so will the Minister explain how that will work, and address the points that have been raised?

It seemed from the Minister's initial remarks—I think there were some gaps in her analysis in response to her hon. Friends—that the Government cannot guarantee at this stage how the takeover regime will operate in the event of no deal. I suggest that she needs to answer that today, if she can. If she cannot, she should write to all members of the Committee with more detail about how the regime will operate in the event of no deal regarding the multi-jurisdictional challenge.

The regulations show again how important it is that the Government do everything in their power to avoid the prospect of no deal. The way forward is to get a plan that Parliament and the EU can support so that we do not end up in that situation in the first place.

2.48 pm

Adam Afriyie (Windsor) (Con): I do not intend to detain the Committee for long. I welcome the statutory instrument, and commend the Government and the Minister for presenting it very well. It is one of the instruments that is beginning to deal with a no-deal scenario, as well as a deal-based scenario. Although many of us wish the Prime Minister well in negotiating the withdrawal agreement and subsequent free trade agreement, it would be the responsibility of any Government to prepare for the eventuality of no deal. The statutory instrument performs both functions, ensuring that our company takeover regime works in both scenarios.

I have a couple of questions. One is that there is a possibility—and I hope it does not arise because of the Brexit vote—that we may remain in the European Union. Would this statutory instrument then need to be reversed if that were the situation? The second question is slightly more technical, and I do not want to push the Minister too hard on this. I am interested in companies with dual listings, both in the EEA or the European Union and in the UK. How does this statutory instrument deal with that situation? I appreciate that she may need some inspiration to answer that question.

The explanatory memorandum says that the regulations transpose the 2004 directive, through the 2006 Act, into our legislation. However, it also says that these regulations will

"fix deficiencies in the Act arising from EU exit and thus preserve, so far as possible, the current takeover regime."

I was wondering why it says "so far as possible". Is it because, despite the great drafting of this statutory instrument, there may well be areas that are not fully covered and that may need to be addressed again in future?

Overall, I will be supporting this statutory instrument. It is absolutely vital that not only this one but probably another 20,000 more come through these Committees and that our job, as Members of Parliament, is very much enhanced when we leave the EU, because we will be doing what we were elected to do in the first place, which is effecting UK law.

2.51 pm

Kelly Tolhurst: I thank hon. Members for their contributions, and particularly the hon. Member for Sefton Central and my hon. Friend the Member for Windsor. This debate has highlighted that the absolute best outcome for us in exiting the European Union should be that we have a deal. We are now talking about a statutory instrument that relates to us leaving the European Union without a deal, so this is a no-deal SI.

These regulations will provide some legal clarity in respect of the takeover regime after the UK's exit from the EU by correcting deficiencies and removing obligations that will no longer be reciprocated by EEA member states. The regulations do not represent a policy change in the operation of the UK takeovers regime; rather, they preserve as far as possible the rights, responsibilities and protections offered by the existing system.

I will now try to answer Members' comments and questions, and if I miss some, they should feel free to intervene on me. Hon. Members have raised the question of what happens on exit day in terms of a situation of straddling jurisdiction and continued co-operation. As I outlined in my speech, we already have a duty to co-operate with countries that are not in the EEA, but that does not preclude us from co-operating with the EEA. It does not stop the EEA from co-operating with us bilaterally, in the way it would co-operate with any country that was not part of the EEA.

In regard to the number of companies, from my current figures, 25 companies have a registered office in the EEA and have traded securities in the UK. Eleven companies currently have a registered office in the UK and have traded securities in regulated markets in EEA countries. We are talking about a small number of organisations. Another statistic that may interest the Committee is that in 2017-18 there were 57 bids, and in the UK the panel dealt with 13 takeover cases relating to £1 billion. That demonstrates the importance of having the regulations in place. I believe I have answered hon. Members' questions about the duty to co-operate, but they are welcome to question me further if not.

My hon. Friend the Member for Windsor asked what would happen to the draft regulations if we remained in the EU or reached a deal. In such an instance, the Government would lay a further statutory instrument before the House to take into account any deal that had been made that changed the position currently on the table.

The hon. Member for Sefton Central asked about the consequential amendments set out in paragraph 7.1 of the explanatory memorandum. As he will know from previous debates, we need to amend UK instruments to correct any deficiencies. I did not mention this in my speech, but the draft regulations make changes that

relate to section 949 of the 2006 Act and criminal offences, and the references to the EEA have obviously been changed in this instrument. So a number of smaller elements have had to be changed through the law.

I think I have answered most of the questions that hon. Members have asked. The Government are committed to ensuring continued business confidence in takeover supervision. The draft regulations make only those changes that are required to effect the UK's exit from the EU. The UK regime should therefore continue largely unchanged, and the net overall effect on the economy will be negligible.

I have just remembered a question that I have not yet answered about impact assessments, which the hon. Member for Sefton Central is particularly concerned about. An impact assessment was not carried out in this instance because the costs that companies are expected to incur as a result of this change are negligible. It affects only a limited number of companies, and the costs would relate directly to the compliance regimes within the other organisations, where they will have to get the supervisory authority. We assess that the financial obligation on businesses will be relatively small, so in this case an impact assessment was not carried out. I therefore urge the Committee to approve the regulations.

Question put and agreed to.

2.58 pm

Committee rose.