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Tenth Delegated Legislation Committee

DRAFT ELECTRONIC COMMERCE AND SOLVENCY 2 (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

Wednesday 20 March 2019

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Sunday 24 March 2019

The Committee consisted of the following Members:

Chair: Mr Adrian Bailey

Blackman, Kirsty *(Aberdeen North)* (SNP)
† Dodds, Anneliese *(Oxford East)* (Lab/Co-op)
† Glen, John *(Economic Secretary to the Treasury)*
† Graham, Luke *(Ochil and South Perthshire)* (Con)
† Grant, Mrs Helen *(Maidstone and The Weald)* (Con)
Grogan, John *(Keighley)* (Lab)
Hepburn, Mr Stephen *(Jarrow)* (Lab)
† Jones, Mr Kevan *(North Durham)* (Lab)
† Kawczynski, Daniel *(Shrewsbury and Atcham)* (Con)
† Lamont, John *(Berwickshire, Roxburgh and Selkirk)* (Con)
† Mackinlay, Craig *(South Thanet)* (Con)
† Smith, Jeff *(Manchester, Withington)* (Lab)
† Snell, Gareth *(Stoke-on-Trent Central)* (Lab/Co-op)
† Stewart, Bob *(Beckenham)* (Con)
† Walker, Thelma *(Colne Valley)* (Lab)
† Whittaker, Craig *(Lord Commissioner of Her Majesty's Treasury)*
† Wragg, Mr William *(Hazel Grove)* (Con)

Medha Bhasin, *Committee Clerk*

† attended the Committee

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Wednesday 20 March 2019

[Mr Adrian Bailey *in the Chair*]

Draft Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019

2.30 pm

The Economic Secretary to the Treasury (John Glen): I beg to move,

That the Committee has considered the draft Electronic Commerce and Solvency 2 (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship this afternoon, Mr Bailey.

As the Committee will be aware, the Treasury has been undertaking a programme of legislation to ensure that if the UK leaves the EU without a deal or an implementation period, there will continue to be a functioning legislative and regulatory regime for financial services in the UK. The Treasury is laying statutory instruments under the European Union (Withdrawal) Act 2018 to deliver that, and a number of debates on statutory instruments have been held in this place and the House of Lords. This statutory instrument is part of that programme.

These draft regulations will fix deficiencies in UK law on the financial services elements of e-commerce, to ensure they continue to operate effectively post-exit. The statutory instrument also fixes deficiencies in an EU Commission delegated regulation that sits under the EU securitisation regulation and sets out further detail of the Solvency 2 regime. The approach taken in that legislation aligns with that of other statutory instruments laid under the EU (Withdrawal) Act 2018 to provide continuity by maintaining existing legislation at the point of exit, but amending it where necessary to ensure that it works effectively in a no-deal context.

On the substance of the statutory instrument, currently the electric commerce directive 2000 implements a regime to facilitate greater cross-border e-commerce activity in the EEA. E-commerce refers to commercial activity that takes place online only. The regime allows EEA firms to undertake online-only activity in an EEA state other than their home state, without being subject to regulation in that EEA country, on the basis that such firms will be subject to relevant regulation in their home state. In the field of financial services, that means that an EEA firm, excluding Solvency 2 insurers, can undertake online-only activity in the UK without needing authorisation from the Financial Conduct Authority. That is implemented in UK legislation through a provision in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, which excludes EEA e-commerce firms from needing FCA authorisation.

In a no-deal scenario, the UK will be outside the EEA and not subject to the e-commerce directive. As a result, the reciprocal arrangement that permitted EEA e-commerce providers to operate in the UK without being regulated in the UK will no longer be valid. The exclusion in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 will therefore be revoked, to prevent EEA e-commerce financial services providers from being able to undertake online-only financial services activity in the UK without the appropriate authorisation from the FCA.

This statutory instrument amends an EU Commission delegated regulation that provides further detail on the provisions of Solvency 2. One provision of that delegated regulation sets out requirements for investments in securitisations that no longer comply with the risk-retention and qualitative requirements. Those requirements relate to changes introduced by the EU securitisation regulation —a piece of legislation that is being domesticated through an earlier statutory instrument.

With regard to the e-commerce directive, these draft regulations therefore revoke article 72A of the Regulated Activities Order, where the exclusion for EEA e-commerce financial service providers from the UK regulation lies. In addition, this statutory instrument revokes the bulk of the regulations in the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002, which gave the FCA rule-making powers pertaining to incoming EEA e-commerce financial services providers. Those will no longer be relevant post-exit.

However, to help protect the interests of UK customers of EEA financial services firms, and those firms themselves, it is also necessary to implement a regime that allows contracts taken out under the current exclusion to continue to be legally serviceable. As such, this statutory instrument will implement a run-off regime, to allow EEA e-commerce firms legally to service financial services contracts that were taken out before the commencement of the instrument, and which utilise the exclusion in the Regulated Activities Order for a limited period of time.

Pre-existing financial services contracts taken out under the e-commerce exclusion will continue to be excluded from the scope of regulated financial services activities under the Financial Services and Markets Act 2000. The run-off regime is similar to the contractual run-off established by the Financial Services Contracts (Transitional and Saving Provision) (EU Exit) Regulations 2019, which was debated by this House. This will enable EEA providers of e-commerce activity of a financial services nature to wind down their UK operations in an orderly manner. That will provide certainty and fairness to both providers and users of financial services, and demonstrate that the UK remains open for business and takes legal certainty and business continuity seriously.

The draft regulations also make minor changes to a Commission delegated regulation related to Solvency 2, to reflect changes introduced by the securitisation regulation. Specifically, the regulations correct a cross-reference and add references to the UK regulators. Those changes are necessary as they were not included in the statutory instrument related to the EU securitisation regulation. The Treasury has been working very closely with the Financial Conduct Authority in drafting this instrument, and February it published the instrument in draft, along with an explanatory policy note to maximise transparency to Parliament and industry.

In conclusion, the Government believe that the proposed legislation is necessary to ensure that online-only e-commerce financial services contracts taken out between EEA firms and UK consumers can continue to be legally serviced, and that the legislation, including retained EU law, will continue to function appropriately if the UK leaves the EU without a deal or an implementation period. I hope colleagues will join me in supporting these regulations and I commend them to the Committee.

2.36 pm

Anneliese Dodds (Oxford East) (Lab/Co-op): It is a pleasure to serve on this Committee with you in the Chair, Mr Bailey.

I am very grateful to the Minister, as always, for all his explanatory remarks. Once again, he and I are discussing a statutory instrument that makes provision for a regulatory framework after Brexit in the event of our crashing out of the EU without a deal. On each occasion, my Front-Bench colleagues and I have spelt out our objections to the Government's approach of using secondary legislation to fulfil that process.

We are finally reaching the end of the process. I echo the remarks made by my hon. Friend the Member for Stalybridge and Hyde (Jonathan Reynolds) on Monday. I thank him for his hard work, as well as those staff who have ably assisted with this Herculean task for the shadow Treasury team, not least Hana Al Izzi, Mary Partington, Max Harris, Suha Abdul and Sophia Morrell.

Yet again we are debating technical legislation that may not be needed, in a context where a major plank of that legislation has not been retabled, due to what appears to be Government reluctance to accept a vote on an amendment relating to tax transparency in Crown dependencies and overseas territories. Although the Financial Services Bill has been postponed, it appears—inevitably—that the long, slow and painful no-deal financial services legislation caravan continues to limp along in other forms, including this SI.

As with previous pieces of no-deal legislation, this SI makes changes that could prove to have a substantial impact. It has simply not been possible to engage with the regulations as proactively and in as detailed a fashion as would have been possible with a more normal timetable. In that context, it is highly possible that mistakes will be made, and the Opposition are very much aware of and concerned about that.

I have three specific questions about this SI. The first concerns naming decisions. It might appear to be a pedantic point but it is a germane one. Anyone trying to find information about this regulation through frequently-used search engines is likely to be provided instead with details for the confusingly virtually identically named electronic commerce no-deal regulation, which came from the Department for Business, Energy and Industrial Strategy. As the Minister mentioned, this SI deals instead with how the securitisation regulation and the electronic commerce directive provisions, once onshored, will interact with the onshored elements of Solvency 2, as well as establishing a new regime for electronic commerce provisions for information society services financial services firms.

As with other SIs, not least the one that we considered on Monday, this process is rather rag-bag and convoluted. Indeed, according to paragraph 2.7 of the explanatory memorandum, it seems that the securitisation element is due to an omission—in fact, the Minister said that it was just now—from the onshoring regulation for the securitisation regulation, which was passed just a few weeks ago. A large element of this SI seems to be just rectifying a previous lacuna, if I have grasped its purpose correctly. I see that the Minister is shaking his head—I am pleased if I have got that wrong and perhaps he can explain it.

Secondly, I want to probe the powers provided to the FCA via this instrument. Presumably these powers, provided during the run-off period, are identical to those provided to domestic EEA regulators for the regulation of information society service financial services firms—sorry for using that phrase again, but I do not think there is any other way to describe them. I want to check that, because regulations 15 to 17 enable the FCA to disapply or vary the exclusion from the need for FCA authorisation for firms in the electronic commerce directive run-off—that is, during the period of a contract being finished off, which could last for up to five years, according to the regulations.

In addition, according to the regulations, the FCA can determine fees for firms that are within the run-off period, so it would be helpful to understand whether those fees will mirror those for registration. I am not an expert in the area, and it is unclear to me whether registration is one shot or continuing. If the former, has thought been given to how the FCA will ensure that firms will not, in practice, be charged twice for registering—once in the EEA and once again during the run-off period? That may be unavoidable, but it would be helpful to understand the Treasury's thinking.

As before, the impact assessment for the SI does not cover the impacts on EEA firms. I understand that the Government have taken that decision, and I respect that, but if it looked as if it would be too expensive for EEA firms to continue to honour those contracts, there would be a big issue for UK consumers.

Finally, as with so many other SIs, the question arises of how the arrangements will be applied in the opposite direction in the event of no deal. In particular, it would be helpful to understand the extent to which the Government understand it is likely that UK electronic commerce firms will still be able to operate in the EU27 in the event of no deal. Given this country's strength in FinTech, I suspect there is a large number of such firms, so it would be helpful to understand whether the Minister anticipates that other EU countries are likely to adopt a similar run-off approach for servicing existing contracts, or a more drastic approach that could obviously lead to major legal difficulties for UK firms if they can no longer legally operate contracts that have already been signed with customers.

2.42 pm

Mr Kevan Jones (North Durham) (Lab): It is a pleasure to serve under your chairmanship, Mr Bailey. I apologise to the Minister—apparently he missed me last week in Committee when I missed an SI. I will make sure not to disappoint him today by asking a question. As my hon. Friend the Member for Oxford East said, we are coming to the end of the long series of SI Committees that we have served on. What a waste of parliamentary time they will have been if we, hopefully, get a deal. I also pay tribute to the civil servants who have spent hours and days of their valuable time on them, rather than their day jobs. A lot of the SIs are formed in the Treasury, but from speaking to former civil servants who I knew as a Minister, I know that civil servants across Whitehall are focused on these matters, so it is affecting their day jobs.

[Mr Kevan Jones]

I will make a couple of points. My hon. Friend the Member for Oxford East raised the issue of overseas territories. In paragraph 4 of the explanatory memorandum, "Extent and territorial application", it says:

"The territorial extent of this instrument is the United Kingdom…The territorial application of this instrument is the United Kingdom."

Could the Minister touch on the overseas territories, such as Gibraltar and others, and how they will be affected or covered by the regulations?

I accept that the regulations are in preparation for a no deal, but in terms of their extent, what evaluation has the Treasury made of the number of contracts that will be caught by the regulations? In that context, what information has been put out to those companies, businesses and individuals about their possible effects when they come in? Many people will obviously want a deal, and are assuming that we will have one, but if we do not, the regulations will hit them straightaway if they are not careful. I wonder what preparation the Treasury has done for that. Some numbers would perhaps give us an understanding of the possible effects.

The Minister used the phrase "a limited period of time". I am not sure that that is a legal definition. What evaluation has the Treasury made of how long the period would last, and what did he mean by "a limited period of time"?

2.45 pm

John Glen: I thank the hon. Member for Oxford East and the right hon. Member for North Durham for their questions, which I will endeavour to answer.

As has been the norm, we have exchanged an analysis of the nature of this process, and the desirability of it. I think it was back in October that the hon. Member for Glasgow Central (Alison Thewliss) asked what the point of it was. I must admit, I have had some reflections on that myself. However, we are getting to the end, with the 54th statutory instrument and the 33rd Committee today. We have systematically brought SIs to Committee under the powers of the European Union (Withdrawal) Act 2018 and, as the hon. Member for Oxford East has shown, we have constructively scrutinised them. We have not agreed on every occasion, but I have sought to do that in as professional a way as possible in the circumstances. I will now examine the points that she has made.

On how the SI is named, I recognise the issues with Google but, as is the case with other pieces of legislation under this programme, it is necessary to group certain provisions together. I am not familiar with precisely how they are named. It is not a process that I have been involved in personally, but I imagine that there is a certain set of protocols, and I recognise that it is rooted in legal language. I cannot say more than that.

On the impact of no deal on e-commerce providers, those established in the UK will lose their exemption from other EEA countries' laws that fall within the co-ordinated field as defined in the e-commerce directive. UK e-commerce firms will therefore want to prepare by checking for any compliance issues or additional legal requirement that they need to comply with in each EEA country in which they operate. UK providers of online services to EEA countries will need to continue to comply with a range of EEA countries' individual legal requirements relating to online activities that already fall outside the scope of the directive.

The purpose of the directive was broadly—I think this touches on another point that the hon. Lady raised—around the alignment between different regulators. The purpose was to say that the domestic national competent authority regulator in an EEA country was sufficient in order to conduct financial services trade online with a UK consumer. That has been the broad understanding to this point. Obviously, if we entered into the undesirable no-deal situation, further legislation will be needed to safeguard UK consumers.

The hon. Lady asked why the changes to the Commission delegated regulation were not introduced in the securitisation regulations. The changes that needed to be made to the delegated regulation required further analysis which, due to timing constraints, the Government were unable to complete by the time those regulations were put before Parliament. To ensure that all relevant amendments were captured the Government therefore decided to spend more time on that analysis, and to introduce the changes through a further SI.

I have never said that this is a perfect process. We always envisaged, when we timetabled the SIs, that there would be a few at the end that would allow us to make provision where there would be some degree of aggregation. I recognise the hon. Lady's point that the neatness, suitability and desirability of it at this stage is not as clear as it could have been, but that was an inevitable consequence of laying 1,000 pages of SIs in this condensed period.

Anneliese Dodds: I am sorry to rewind the Minister a bit, but I was not sure when he had finished his previous point. Just to be absolutely clear, we have been able to get some agreement, as I understand it, from the EU-level regulators that there would be reciprocal provisions on some other areas of financial services. Is the Minister suggesting that in this area we do not yet have that kind of agreement, and therefore that there could be problems with the continuation of contracts unless agreement is reached with those other regulators?

John Glen: In terms of reciprocity in a no-deal situation, actions taken in recent days and weeks give us that equivalence assessment. The scope and effectiveness of those going forward would not be fully compliant. We would then be in a situation, in the case of no deal, where we would need to undertake considerable examination and further legislation in that context.

On registration, EEA firms will need to notify the FCA but they will not need to register. That will not incur a fee. The right hon. Member for North Durham raised a number of points about evaluation and the time of the run-off. The maximum length of the run-off is five years. It is that long because of the scope of the contracts that could be involved.

The hon. Member for Oxford East asked about the assessment the Treasury had done of the number of contracts between UK consumers and EEA firms. It is very small because most UK consumers would not be comfortable entering into that sort of contract with an online-only company in the EEA. Our assessment and that of the FCA is that that number is, therefore, very small.

The right hon. Member for North Durham mentioned the territorial application of the legislation with respect to overseas territories. The SI does not affect the law in Gibraltar or the Crown dependencies, being Jersey, Guernsey and the Isle of Man. I do not know about the overseas territories. I do not know whether Gibraltar is a proxy for all of the overseas territories—I imagine so. I will write to clarify that matter because I do not wish to mislead the right hon. Gentleman.

We had a de minimis impact assessment because we anticipated very few contracts due to the limitations of the online activity and online-only business that exists. We expect EEA firms to use passporting instead of the e-commerce exclusion. I am happy to examine the matter in more detail. I will write to the right hon. Gentleman on that point and acknowledge that my answer is not adequate.

I hope I have answered hon. Members questions. I recognise this has been a long and arduous process. I would like to put on record my respect and thanks to the hon. Member for Oxford East for the constructive and thorough way in which she has taken the matter on and how we have engaged in these Committees.

I would also like to acknowledge the considerable support I have had from hon. Members on the Government side of the Committee, in particular the Lord Commissioner of Her Majesty's Treasury, my hon. Friend the Member for Calder Valley, who has been with me on every single one, and the various Parliamentary Private Secretaries who have supported me.

I am not taking for granted that the Committee will agree the SI this afternoon but, in conclusion, I would say that we do need it to ensure that EEA firms providing e-commerce of a financial services nature can continue legally to service their contracts, and that the legislation functions appropriately if the UK leaves the EU without a deal or an implementation period. The SI also ensures that retained EU law remains accurate if the UK leaves the EU without a deal. I hope the Committee found my answers and explanation satisfactory and will agree the regulations.

Question put and agreed to.

2.54 pm

Committee rose.