PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Fourth Delegated Legislation Committee

DRAFT PROTECTING AGAINST THE EFFECTS OF THE EXTRATERRITORIAL APPLICATION OF THIRD COUNTRY LEGISLATION (AMENDMENT) (EU EXIT) REGULATIONS 2019

Monday 1 April 2019

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

Friday 5 April 2019

The Committee consisted of the following Members:

Chair: Mr Virendra Sharma

† Churchill, Jo *(Bury St Edmunds)* (Con)
† Courts, Robert *(Witney)* (Con)
† Efford, Clive *(Eltham)* (Lab)
† Esterson, Bill *(Sefton Central)* (Lab)
† Fabricant, Michael *(Lichfield)* (Con)
† Hollingbery, George *(Minister for Trade Policy)*
Hosie, Stewart *(Dundee East)* (SNP)
† Jones, Graham P. *(Hyndburn)* (Lab)
† Kerr, Stephen *(Stirling)* (Con)
Kyle, Peter *(Hove)* (Lab)
† Lopez, Julia *(Hornchurch and Upminster)* (Con)
† Malhotra, Seema *(Feltham and Heston)* (Lab/Co-op)
Phillipson, Bridget *(Houghton and Sunderland South)* (Lab)
† Quince, Will *(Colchester)* (Con)
† Twist, Liz *(Blaydon)* (Lab)
† Vickers, Martin *(Cleethorpes)* (Con)
† Watling, Giles *(Clacton)* (Con)

Mike Winter, *Committee Clerk*

† attended the Committee

Fourth Delegated Legislation Committee

Monday 1 April 2019

[Mr Virendra Sharma *in the Chair*]

Draft Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2019

6 pm

The Minister for Trade Policy (George Hollingbery): I beg to move,

That the Committee has considered the draft Protecting against the Effects of the Extraterritorial Application of Third Country Legislation (Amendment) (EU Exit) Regulations 2019.

The existing EU regulation that we are seeking to transition, No. 2271/96, is commonly known as the EU blocking regulation. As its formal name suggests, it is designed to protect UK and EU businesses from the harmful effects of the extraterritorial application of legislation adopted by another country. That refers to a situation in which a country has enacted certain laws, regulations and other legislative instruments that purport to regulate activities of natural and legal persons outside its jurisdiction who are not its citizens and who are not legal persons incorporated in that jurisdiction. It could, for example, result in penalties against a UK citizen for carrying out activities in the UK that we consider to be fully legitimate under our law. The UK and EU have long opposed the extraterritorial effect of sanctions legislation on our businesses and the dissuasive impact that that can have on legitimate trade.

The blocking regulation is designed to protect UK businesses in two key ways. First, article 4 guarantees that courts in EU member states will not recognise or allow the enforcement of judgments against EU businesses for fines that they incur in a third country for breaching sanctions with extraterritorial effect. Secondly, article 6 enables businesses to seek damages through the courts in any member state should they be negatively impacted by the application of extraterritorial legislation within the scope of the blocking regulation.

There may be occasions on which compliance with third-country sanctions regimes is necessary—in the interests of businesses and our wider Government policy to continue to trade with Iran, Cuba and Libya. Where those instances occur, the EU has the power to issue authorisations for businesses to comply with third-party sanctions regimes. How is that done? The EU considers requests for compliance authorisations in accordance with the process and criteria set out in Commission implementing regulation 2018/1101 of 3 August 2018, referred to as the implementing regulation.

Using powers under section 8 of, and paragraph 21(b) of schedule 7 to, the European Union (Withdrawal) Act 2018, this draft SI amends the blocking regulation and the implementing regulation as retained in UK law and fixes them for the UK-only context. Generally speaking, the draft SI transfers the functions of the European Commission to the Secretary of State, as would be expected of all SIs made under the EU withdrawal Act. For instance, once this draft SI enters into force, UK businesses will be able to apply to the Secretary of State for permission to comply with US extraterritorial sanctions and the Secretary of State will be able to grant that permission, according to whether they judge the applications to be consistent with criteria set out in legislation. Such criteria include considering whether, if an authorisation were denied, a company would face significant economic losses that might threaten its viability or pose a serious risk of bankruptcy, or whether it would lose access to essential inputs or resources.

Currently, the Commission defines the scope of the blocking regulation—that is, which specific pieces of legislation it applies to—through tertiary legislation amending and updating the annex to the blocking regulation. The draft SI transfers that power to the Secretary of State through the mechanism of the laying of an SI under the negative procedure.

As we leave the EU, we must ensure that we continue to protect UK businesses from the effect of extraterritorial legislation. Our opposition to extraterritorial legislation is of long standing and predates the blocking regulation. The UK has had legislation making that evident on the statute book since 1980; I am referring to the Protection of Trading Interests Act 1980. We firmly believe that our operators should be able to continue legitimate trade free from the harmful effects of the extraterritoriality that we consider to be illegal under international law. These draft regulations are a key part of that policy stance and are particularly relevant given our foreign and trade policy stances on Cuba and Iran.

I welcome the opportunity for full scrutiny of this draft statutory instrument and look forward to hearing colleagues' contributions.

6.5 pm

Bill Esterson (Sefton Central) (Lab): It is a pleasure to serve under your chairmanship, Mr Sharma. Thank goodness the Government were defeated in their attempt to prevent the business of the House motion from going through; otherwise this debate would have been held on the Floor of the House rather than under your chairmanship. I think this is probably the right way around.

The statutory instrument appears to be a sensible piece of proposed legislation. It is necessary to ensure that British legal and natural persons are not subject to judicial overreach by the courts or judiciaries of foreign countries when implementing their Governments' foreign policy objectives. I thank the Minister for his opening remarks and for taking us through the detail of what is quite a technical set of draft regulations. I saw him outside, and while I will not say that he was sweating in his preparation, he was certainly going through it with a fine-toothed comb. He may not be the only member of this Committee to have been through such a process.

A number of concerns flow from the Minister's opening remarks about how the draft regulations might be applied in a domestic setting, and whether what he has expressed as the Government's desire is indeed what will happen. It is right and proper that the United Kingdom should determine our own approach to foreign policy and the treatment of our citizens and those legal and natural persons who call the UK home.

The draft regulations address the continued disapplication of third-country laws that might have an impact on our citizens. In particular, they refer to listed sanctions measures imposed by the United States on Cuba, Iran and Libya. The underlying EU regulations were introduced as a response to the Helms-Burton Act 1996, which allows US-based companies to sue foreign persons for trade relating to expropriated US-owned goods or assets. Such trade is considered trafficking under that Act and claims may be brought under title III by US companies even where the link between that trade and what may have been expropriated is tenuous.

Similarly, Canada, Mexico and Argentina have applied blocking measures in their respective jurisdictions, showing a similar level of concern to the EU in doing so. Such was the international uproar over the measures when they were introduced that successive United States Presidents have suspended the application of title III for a period of six months on a rolling, concurrent basis. I think I am right in stating that no such cases have been brought against British companies to date.

The current President of the United States, however, has demonstrated that he takes a rather different interest in and approach to international diplomacy and international law compared with his predecessors. In January, he determined that the suspension of title III would be continued on a 45-day basis only. That period has now expired, and it seems it is now open season for US companies to take action against foreign companies. It is against that backdrop of the very real threat of legal proceedings and substantial financial claims being made against British individuals and companies that we consider these important draft regulations.

The draft regulations seek to replicate the EU's existing list of third-country legislation to which these measures relate. However, as one might expect, they allow the Secretary of State to add to or delete from the list. Given the imminent threat faced by British businesses, can the Minister confirm that the Government do not intend to delete anything from that list once we have left the European Union? Perhaps he could also indicate whether he has any intention of adding to that list, and whether he is aware of any further extraterritorial legislation that may be in the pipeline, particularly given the approach of the current United States Administration with respect to Venezuela.

British businesses will rightly be concerned about the risk of extraterritorial judgments being awarded against them, encouraged by a White House that has declared open season for US investors. Can the Minister tell us what assessment his Department has made of the potential impact of such claims and of the exposure of British entities to them?

Under the existing EU measures, namely Council regulation 2271/96—the so-called blocking regulation—and Commission implementing regulation 2018/1101, which have been implemented into our domestic law by statutory instruments 1996/3171 and 2018/1357, EU persons are specifically forbidden from complying with the judgments, actions or proceedings of any judiciary of those third countries, unless otherwise authorised to do so by the European Commission. The blocking regulation obliges any EU person who may be so affected to notify the Commission within 30 days, so that a determination as to whether to authorise may be made.

In order to clarify the Government's policy intentions, I ask the Minister whether either he or the Secretary of State intends to regard authorisations already given or refused by the European Commission as precedent to follow, and whether any future decisions by the European Commission will inform our own.

The current list of extraterritorial legislation to which these draft regulations apply includes only laws and regulations introduced by the United States. The Secretary of State has had many conversations—both formal and informal—with his counterparts in the United States. The Minister may have had similar conversations. During those discussions, what conversations have taken place on matters covered by these draft regulations, and what representations has the Secretary of State or the Minister made in defence of British businesses against potential title III claims?

On the face of it, these draft regulations appear relatively straightforward, largely replacing references to European Union institutions that remain in retained EU law with references to the United Kingdom. Such amendments will ensure that the provisions, which currently seek to disapply the effects of extraterritorial third-country legislation, will continue to apply in a UK-specific context after Brexit.

In so doing, however, the Government have made a number of amendments to the original European wording and have sought to delete provisions that provide for a degree of scrutiny by the European institutions, without suggesting similar scrutiny measures to replace them. That should be a matter of concern to members of this Committee.

Under article 5 of the blocking regulation, the Commission may authorise that a person complies with third-country legislation, to which these draft regulations apply, where to not do so

"would seriously damage their interests or those of the Community."

Draft regulation 3(6) seeks to transfer that power to the Secretary of State, who may make such authorisation by way of a statutory instrument.

The Government have also sought to amend the powers under article 5 by further allowing the Secretary of State to make, by way of regulation,

"provision in connection with the making and consideration of applications to be so authorised."

Such extra powers appear to be wide in scope, and it is unclear precisely in which circumstances the Government envisage they would need to be employed. I would be grateful, therefore, if the Minister explained the Government's intention and whether these powers will be used without the further approval of either House of Parliament.

Under article 7 of the blocking regulation, the Commission is obliged to

"inform the European Parliament and the Council immediately and fully of the effects of the laws, regulations and other legislative instruments and ensuing actions mentioned in Article 1, on the basis of the information obtained under this Regulation, and make regularly a full public report thereon".

Draft regulation 3(8)(c) seeks to transfer those powers to the Secretary of State but removes the obligation to inform Parliament immediately and fully of the effects of the laws, regulations and other legislative instruments and ensuing actions mentioned in article 1. It retains

[Bill Esterson]

the obligation to make a public report, but removes the sense of urgency by removing the reference to "immediately" for the new arrangements.

Why has the Minister removed the obligation to immediately inform Parliament? Will he set out when and how such public reports will be delivered, including under the reporting obligations set out in article 4 of the Extraterritorial US Legislation (Sanctions against Cuba, Iran and Libya) (Protection of Trading Interests) Order 1996, as amended in 2018?

Article 7(b) and article 8 of the blocking regulation make provisions for the European committee on extraterritorial legislation to be consulted in respect of authorisations that are to be made compelling a person to comply with the extraterritorial application of third-country legislation. The draft regulations omit those provisions and contain no proposal for any corresponding committee to have such a role in the United Kingdom.

Can the Minister tell us whether there are plans to create such a committee? If not, how will existing European Union committee scrutiny be replicated in respect of the regulations? The Government pretending to return sovereignty to our Parliament, while repeatedly applying powers withdrawn from European institutions exclusively to the Executive, has become a familiar occurrence. As an aside, I draw the Minister's attention to what we think is a drafting flaw resulting from draft regulations 3(8)(c) and 3(8)(d), which suggest that article 7 requires no additional paragraphs.

Turning to other proposed changes, draft regulation 3(7) amends article 6 of the blocking regulation, which sets out the powers of an affected person to seek redress or recovery of damages. The clause has been referred to as the "clawback clause", as it allows affected counterparties to initiate proceedings against the foreign entity by which they have been affected. A judgment may be made that results in the awarding of damages and legal costs, and in the potential confiscation of assets to settle outstanding liabilities.

The blocking regulation dictates that such proceedings must be made in accordance with the Brussels convention, which requires claims to be made in the jurisdiction of the member state wherein the person causing the damage, or an intermediary or assets held thereby, is located, as the Minister mentioned in his opening remarks. It would be helpful to understand why the Government have sought to remove that section entirely, and how they propose to administer penalties for failures to comply with the obligations set out under the blocking regulation.

Draft regulation 3(12) seeks to amend article 11 of the blocking regulation, which sets out to whom it applies. Draft regulation 3(12)(g) inserts a new definition:

> "For the purposes of this Article, a natural person is resident in the United Kingdom where that person has been so resident for a period of at least six months within the 12-month period immediately prior to the date on which, under this Regulation, an obligation arises or a right is exercised."

The question of residence has been debated many times by hon. Members in this House and has been clearly defined in statute, with the most familiar test being whether a person has been present in the United Kingdom for at least 183 days in a 365-day period. The definition presented in the draft regulations does not appear to apply the same test, in that it suggests that a person must be resident for at least a six-month period. I ask the Secretary of State—*[Interruption.]* No, not the Secretary of State; he is not here. If only he were.

The Chair: I do not think the Minister minds.

George Hollingbery: Oh, I do.

Bill Esterson: As the Secretary of State is not here, we will settle for the Minister. Can he clarify whether it is the Department's intention that persons must have been resident for a continuous six-month period or is the 183-day test to be applied?

These are serious and complex matters and I welcome the opportunity to debate them today. As the United Kingdom seeks to be a stronger voice in defence of the rules-based system that underpins global trade and international relations, it is important not only that such legislation is in place, but that the Government address the matters raised in this debate and put their policy intention on the record.

6.21 pm

George Hollingbery: As a small matter of fact, the Burton-Helms Act is not back on the register, but 17 April is just around the corner, so I absolutely take the point made by the hon. Member for Sefton Central. That is why Cuba is included on the list.

The hon. Gentleman asked a number of questions. I was asked to confirm whether the Government have any intention of deleting from or adding to the list, and the answer is no. I have had no conversations to that effect that I am aware of, and my officials advise that that is the case as far as they, too, are aware. He asked whether there was any Government assessment of the potential effect on UK companies of any such claims coming forward. The answer is that it is impossible to know without knowing how many claims would come forward, when they would come forward, to whom and on what issues. Therefore, it is impossible to make that sort of estimate.

However, I cannot think it would necessarily change any policy decisions, certainly in this regard. This draft instrument is designed to demonstrate to the United States that we do not respect the extraterritoriality of its legislation. That is the principal issue we face; I do not think that doing that assessment would have changed our mind about that, and in any event I cannot see how we would calculate it.

Bill Esterson: I am sure it is not an easy thing to do, but presumably some assessment must have been carried out when the EU originally brought in the blocking regulations. Of course, we are staying consistent with that approach, but presumably there is some sense of intent on the part of the United States Government, or of companies in the United States, that would inform the decision and why it is so important that these regulations are transferred.

George Hollingbery: One could argue about this for hours. Quite straightforwardly, we have not done such an assessment. The regulations are there, for example, in addition to the penalties and fines that the hon.

Gentleman is talking about, to ensure that the United States or United States-based companies cannot sue UK companies in UK courts. I do not know how one would assess the level of return and/or cost that that might represent.

To my mind, this is about a base principle: we do not recognise the extraterritorial power of the US regulations, and we are therefore legislating to ensure that British companies do not have to comply with them in our courts or indeed elsewhere. I am not at all aware that any cost analysis was done when the measure was previously put in place, but I do not believe we would add much to the mix by doing another one for a UK context, particularly given that it has been in place for the best part of 20 years. It is what it is; it has been in place for 20 years, and we are seeking today to transfer it into a UK context.

The hon. Gentleman asked about notification and the amount of time within which it is expected that people will tell the Government. The answer is 30 days. He also asked whether I have had any conversations with the United States trade representative, Bob Lighthizer, and others. In a personal context, I can answer that I have never had such conversations, nor am I aware of any other such conversations having taken place with others.

We will publish a list of those who have been authorised and what they have been authorised for. The EU does not currently publish such a list, so we believe that will be a useful piece of information and that it will apply transparency to our suggested arrangements. We went over the issue of legal cost to jurisdictions and other member states. Plainly, there is no equivalent item for ensuring that the member state in which that person lives is notified to the Commission, because that person is living in the United Kingdom as a citizen, so I cannot see why that section is required.

I will speak quickly about enforcement. The Department for International Trade does not carry an investigation directorate. If we found that a complaint merited further investigation, we would pass the details on to the police and they are entirely entitled to investigate it. If companies feel that they have been disadvantaged by other people complying with the extraterritorial legislation of the United States, they are entitled, if they wish, to bring an action against that company in civil courts. That is provided for.

Finally, I thank the hon. Gentleman for his pointer towards the drafting errors in draft regulations 3(8)(c) and 3(8)(d). I have no particular knowledge of that, but I have no doubt that the lawyers will look at it carefully.

Bill Esterson: I asked the Minister about the transfer of the current scrutiny arrangements. The specific institutions of the EU that scrutinise the operation of the regulations in the EU have not been replicated in the UK; they have just been taken on by the Secretary of State. On the issue of the immediacy of reporting to Parliament, the requirement for the EU to report immediately is not replicated in the proposed regulations.

George Hollingbery: It is the UK Government's intention to publish, as I have described, in every instance. We have not yet determined the exact method for that, or the period in which it will be done, but I can say that the Opposition and others have my absolute commitment that those names will be published along with what those names or companies are allowed to do.

Question put and agreed to.

6.28 pm

Committee rose.