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OFFICIAL REPORT

Third Delegated Legislation Committee

DRAFT ENTERPRISE ACT 2002 (EU FOREIGN
DIRECT INVESTMENT) (MODIFICATIONS)
REGULATIONS 2020

Wednesday 8 July 2020

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The Committee consisted of the following Members:

Chair: MRS MARIA MILLER

- | | |
|---------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| † Allan, Lucy (<i>Telford</i>) (Con) | Sheerman, Mr Barry (<i>Huddersfield</i>) (Lab/Co-op) |
| † Davies, Dr James (<i>Vale of Clwyd</i>) (Con) | † Simmonds, David (<i>Ruislip, Northwood and Pinner</i>) (Con) |
| † Fletcher, Mark (<i>Bolsover</i>) (Con) | Tarry, Sam (<i>Ilford South</i>) (Lab) |
| † Garnier, Mark (<i>Wyre Forest</i>) (Con) | † Thompson, Owen (<i>Midlothian</i>) (SNP) |
| † Harper, Mr Mark (<i>Forest of Dean</i>) (Con) | † Tomlinson, Michael (<i>Lord Commissioner of Her Majesty's Treasury</i>) |
| † Hunt, Jane (<i>Loughborough</i>) (Con) | † Twist, Liz (<i>Blaydon</i>) (Lab) |
| † Jones, Mr Kevan (<i>North Durham</i>) (Lab) | Peter Stam, <i>Committee Clerk</i> |
| † Lewell-Buck, Mrs Emma (<i>South Shields</i>) (Lab) | † attended the Committee |
| † Penrose, John (<i>Weston-super-Mare</i>) (Con) | |
| † Powell, Lucy (<i>Manchester Central</i>) (Lab/Co-op) | |
| † Scully, Paul (<i>Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy</i>) | |

Third Delegated Legislation Committee

Wednesday 8 July 2020

[MRS MARIA MILLER *in the Chair*]

Draft Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020

9.25 am

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

That the Committee has considered the draft Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020.

It is a pleasure to open the debate under your chairmanship, Mrs Miller. The draft instrument was laid before the House on 8 June. I will try to clearly explain the rationale behind it, but first let me turn quickly to foreign direct investment more broadly.

The UK has a proud and hard-won reputation as one of the most open economies in the world. We remain the top destination in Europe, and the third in the world, for foreign direct investment, with 58,000 new jobs created in the UK in 2018-19 through that inward investment.

Although most FDI does not raise concerns, it is vital that any transactions that could operate against the public interest should be scrutinised. Under the Enterprise Act 2002, the Secretary of State has powers to intervene in mergers that present public interest concerns. The Government will shortly bring forward the National Security and Investment Bill to further strengthen the UK's ability to scrutinise investment into the UK. There will be the usual opportunities to debate the Bill once it is introduced.

The European Union also recognises the security risks that can, on occasion, be posed by foreign direct investment, and has responded by bringing forward a regulation that establishes a framework for the screening of foreign direct investment into the European Union. The draft instrument will make effective that regulation, which will come into force on 11 October. As Committee members will know, under the withdrawal agreement the UK is obliged to implement EU law during the transition period. Most of the regulation's provisions will automatically have direct effect in the UK. I will briefly set out its purpose.

The regulation will create a mechanism that will allow the UK, member states and the European Commission to share information about investments with each other. Specifically, the EU regulation does three things. First, it requires member states and—for the duration of the transition period—the UK to provide notification of any FDI that is undergoing scrutiny. That will have no impact on us, because in the UK notifications of screening under the Enterprise Act are already published on gov.uk.

Secondly, the regulation allows the UK, member states and the European Commission to issue opinions and comments on investments that are being screened elsewhere in the EU, and to request information where their own security or public order might be affected. To be clear, while any opinions expressed might be considered, they will not affect the UK Government's right to intervene in or make decisions on merger cases that we consider may raise national security concerns: our sovereign capability is not affected.

Thirdly, the regulation requires member states and the UK to share basic information about FDI that has not already been screened where it may affect another member state's security or public order. The UK could similarly request information or issue opinions on investments occurring in EU member states if we felt that our security or public order might be affected. Member states and the UK are not required to share information on specific security or public order concerns.

The EU regulation will automatically become part of UK law on 11 October 2020. However, some measures in the regulation require changes to UK law to ensure that it can operate effectively in the UK. The draft instrument makes those changes. It will allow the Competition and Markets Authority, the CMA, to use its existing powers, set out in the Enterprise Act, for the purposes of regulation.

However, two changes to the Enterprise Act are being made. The first extends the CMA's existing information-gathering powers and associated penalty regime. The CMA already gathers information for businesses, when the Secretary of State intervenes in a merger, by issuing a public interest intervention notice, or PIIN. However, the EU regulation allows information to be requested about FDI that is not undergoing screening—when a PIIN has not been issued. It is these cases for which the additional information-gathering powers are needed.

The CMA will be able to gather this information only when a member state or the European Commission has requested it on the basis that FDI into the UK might affect their own security or public order. The types of information that can be requested include the ownership structure of the foreign investor, the value of the investment and the date when the investment is planned to be or has been completed. Businesses already hold that information, so it will not be burdensome to provide. If, however, a business fails to comply with a request, penalties could be issued. The instrument extends the scope of the existing civil and criminal penalty regime available to the CMA, as set out in the Enterprise Act.

The second change that the instrument makes will allow the Secretary of State and the CMA to disclose information to the European Commission or member states where the Secretary of State wishes to provide comments on FDI in a member state. The Enterprise Act already allows the Secretary of State or CMA to provide information to the Commission or member states where that is required because of a Community obligation, but that would not be the case when we actively choose to provide comments on FDI in a member state, which is why the second change is needed.

Mr Mark Harper (Forest of Dean) (Con): May I ask the Minister a question about that second point? I have been listening very carefully to what he said. The explanatory notes make it clear that these regulations will be revoked at the end of this year, when the transition

period comes to an end. In the Bill that we will introduce, are we proposing to allow Ministers to continue sharing information with the European Union where they choose to do so in the cases that he set out, or will that come to an end when these regulations are revoked?

Paul Scully: I thank my right hon. Friend for his intervention. The regulations will be repealed as part of the wider European Union (Withdrawal Agreement) Act 2020. They do not interact with the Bill that we are introducing, but add further powers that can be used.

The UK and the EU have both stated that we intend to support ambitious, close and lasting co-operation on external threats. That co-operation should respect both sides' strategic and security interests and respective legal orders. We are open to participation in security-facing EU programmes and instruments on a case-by-case basis.

Mr Kevan Jones (North Durham) (Lab): The right hon. Member for Forest of Dean makes an interesting point. Is there not going to be a gap between the lapsing of this legislation and the new Bill to which the Minister refers? This week, we announced sanctions against a number of individuals—independently of any other country, including the EU. Does that not leave us at a disadvantage if we are not able to get information, perhaps about people we think are a threat but the EU does not?

Paul Scully: I thank the right hon. Gentleman for his intervention. Both the UK and the EU have expressed our intention to co-operate as best we can. How that is structured will be part of the negotiations. Although this measure does not directly interact with the new Bill, we intend to introduce the Bill very soon.

Mr Jones: This is like a lot of things to do with the withdrawal agreement Act—it is wishful thinking, and there will be a gap that will put the UK at a disadvantage. Great fanfare was made this week about the fact that we can now sanction individuals who use investment as a way of hiding money. It was said that that is a great step forward for our freedoms from the EU. If we do not have a seamless connection, this measure will leave us at a huge disadvantage, because there will be no onus on the EU to share any information with us.

Paul Scully: As I say, although we are obviously obliged to abide by EU law during the transition period, we do not believe it would be appropriate to remain part of the reciprocal information-sharing channel after the transition period has come to an end. As I say, when the National Security and Investment Bill is introduced, we will be able to debate that fully.

Mr Harper: May I clarify something? I think the right hon. Member for North Durham is asking a slightly different question about reciprocal obligations. My question was more straightforward. These regulations give the CMA a power that it does not currently have to share information that we wish to share.

All I was asking was this: in the future, when we are no longer obligated to share information with the EU, will Ministers have the legal power to share that information

if they chose to? They will under these regulations, but once those are revoked will Ministers have the power, under the Bill that the Minister has talked about, to share information with the EU if they choose to do so? That is all I was asking. I did not go quite as far as the right hon. Gentleman was suggesting.

Paul Scully: I thank my right hon. Friend for that clarification. We already share a lot of this information on gov.uk, and it is not particularly burdensome on businesses to release the information we are looking for. Much of this work is in effect tidying up, because we have gone that little bit further in the Enterprise Act.

Mr Jones: I say in response to the right hon. Member for Forest of Dean that there will be no obligation on Ministers to share information. There might be good will, and it might be in our interest to share the information, but there will be no legal obligation as there is now.

Paul Scully: As I said, we already go far enough with the Enterprise Act. The information is released and on gov.uk. This is very much a tidying-up exercise to ensure that the legislation works.

Mark Garnier (Wyre Forest) (Con): My apologies for pressing the point, but having been the Minister for Investment at the Department for International Trade, I know there are quite significant implications in the question from my right hon. Friend the Member for Forest of Dean and all of this.

Ministers from the Department for International Trade will be actively seeking foreign direct investment into UK businesses and, at the same time, the Competition and Markets Authority could start pushing back against those active Government interventions to bring people into the country, for various reasons. If Ministers could disclose some of the information at the start, that would pre-empt the problem otherwise of Departments working against each other, which would be to the benefit of the country. Should DIT officials try to start bringing in people who may be a bit dodgy, we could work out that they were dodgy before we started all the hard work. That is why that question is so important.

The Chair: Order. Before I ask the Minister to respond, may I gently bring hon. Members back to the fact that we are considering the instrument before us, not any future instruments?

Paul Scully: Thank you for that clarification, Mrs Miller, and I thank my hon. Friend for his intervention. We can debate this issue when the National Security and Investment Bill comes to Parliament.

The second change that the regulations make will allow the Secretary of State to disclose information to the European Commission or member states when the Secretary of State wishes to provide comments on FDI in a member state. As I said earlier, the Enterprise Act already allows the Secretary of State or the CMA to provide information to the Commission or member states where required because of the Community obligation.

The interventions were about further information that is not necessarily required, but I believe that in the upcoming National Security and Investment Bill we

[Paul Scully]

will have plenty of chances to debate the area and ensure that, with the Enterprise Act, it is solid. Although we do not believe that we should be part of a reciprocal information-sharing procedure at the end of the transition phase, we are already going that little bit further anyway. However, it will be revoked, along with the EU regulation.

David Simmonds (Ruislip, Northwood and Pinner) (Con): I want to address a key issue for me: the need to have something in place to ensure certainty. That addresses the point made by the right hon. Member for North Durham. These measures envisage a seamless arrangement until such time as Parliament has implemented new measures. What I think I read in the explanatory memorandum is that the Enterprise Act ensures that the system of which we are currently a part with the European Union to manage the process is operational in UK law through the Competition and Markets Authority.

Paul Scully: I thank my hon. Friend. The UK and the EU will have separate jurisdictions to scrutinise mergers. The EU might look at a merger if it is relevant, but that would not stop the CMA from conducting its own investigation.

Mr Jones: The hon. Member for Ruislip, Northwood and Pinner tried to help the Minister out, but I do not think he did: the regulations, which I have no problem with, lapse when the transition period ends. Obviously, the new Bill will try to cover some of these areas. If we believe the Prime Minister, this is all going to be done and dusted by January next year, so that Bill will have to come in before January 2021 if we are to have the seamless transition the Minister has referred to.

Paul Scully: That is a topic we will come to when we introduce the Bill. Hopefully, with the co-operation of Her Majesty's Opposition, we can get that through swiftly and at the appropriate time to allow for that seamless approach.

To conclude, this instrument is not going to make fundamental changes to the UK's investment screening regime. The UK is going to retain the levers in the Enterprise Act that allow the Secretary of State to intervene in a merger. The instrument will also not affect plans for the forthcoming National Security and Investment Bill, nor will it interact with the two instruments laid before the House on 22 June, which amend the Enterprise Act 2002. However, it is necessary to agree this instrument to ensure that the UK complies with EU law, as is our duty under the withdrawal agreement.

9.41 am

Lucy Powell (Manchester Central) (Lab/Co-op): It is a pleasure to serve under your chairmanship, Mrs Miller. I note that some of us have made good use of our local enterprises over the past few days by getting our hair done—something the Minister was much concerned about the last time we spoke. I hope that all Members will make use of those local enterprises in the coming days.

The Opposition are happy to support today's instrument. It is right for the Government to make sure that the UK meets its legal obligations under all EU regulations,

including the foreign direct investment regulation, until the transition period comes to a formal end. We support the enhancements to the Competition and Markets Authority's existing powers to gather the necessary information and share it with our European partners when required. If the UK leaves the transition period on 31 December 2020, as the Government intend, the foreign direct investment regulation and this instrument will have been in place for just 12 weeks. We therefore consider its impact to be minimal, and that is why we support it.

However, the instrument contains a number of desirable powers. I therefore urge the Government to bring forward the necessary legislation to which the Minister has alluded in good time, to ensure there is not the gap that my right hon. Friend the Member for North Durham has highlighted. I also ask the Minister to work with the CMA to ensure that its enhanced powers are deployed proportionately, respecting the additional burdens placed on many small businesses at the moment due to the covid-19 crisis.

It is, of course, important that the regulation is backed up by a meaningful sanctions regime, but we hope those sanctions will be used in a proportionate and considerate manner, given the short window covered by this instrument.

9.43 am

Mr Kevan Jones: It is a pleasure to serve under your chairmanship, Mrs Miller. It is also a pleasure to see the Government squirming when it comes to how shambolic the exit from the EU is becoming. The regulation that we are considering will be in place until the end of the transition period. The Minister cannot say when the new National Security and Investment Bill will come forward, but given the snail's pace at which the Government are bringing forward legislation at the moment, I doubt it will be in before Christmas, so there will be a gap.

It also concerns me that after the transition period we will be left with what I think the Minister referred to as the "good will of Ministers". That is not a legislative term that I am aware of—that we are to let the Executive exercise their good will. Interestingly, the explanatory memorandum states that

"An Impact Assessment has not been prepared for this instrument" because

"no, or no significant, impact"

on the private sector, "voluntary bodies" or "the public sector" is foreseen. I am sorry, but I do not accept that. If there is a gap during which we are relying on Ministers to take case-by-case decisions on whether they share information with the EU, that is quite a significant impact.

As I said to the Minister in my earlier intervention, the Government this week congratulated themselves on having new powers, free from the awful EU, to sanction individuals. Without co-operation with the EU or other nations on information sharing in this and other security sectors, however, we can have all the powers we like but, frankly, if we do not have the information to implement them or to co-operate with other nations, they are pretty meaningless. That gap will be there, which concerns me.

The other thing that concerns me is what the Minister just said. He said that, under the new Bill, we will not have a system of automatic transfer of information with the EU. That is absolutely silly from our point of view, because we do not live in a hermetically sealed bubble in this country where everything that goes on outside our borders can be forgotten and cannot affect us. We are interrelated, whether with the EU or other nations. Some Government Members want to portray the vision that Britain can somehow pull a duvet over its head and ignore the rest of the world but, I am sorry, it cannot. That is quite serious.

Increasingly, as shown this week by the sanctions, people want to hide money. States, individuals and criminals, for whatever purposes, use investment as a way to cleanse that money through the system. When we leave the transition period, it will be vital to share that information with the EU and other countries. If we do not, we will not have the ability to test whether the money is clean or linked to individuals who we do not want to be associated with, or whether for some other reason the money has come from sources that we do not approve of.

It is important for that information to be there. If it is not, and it is left to a Minister after the transition period, we will be at a huge disadvantage without the National Security and Investment Bill. When will that come forward? If the direction of travel in that Bill is that—I know it is like red meat to Tory Back Benchers—we will not share anything with the EU because that nasty old institution will dilute our great freedoms, I come back to the point that, without co-operation with other nations on that area and a whole host of others related to national security co-operation, we will be at a huge disadvantage.

Jane Hunt (Loughborough) (Con): Does the right hon. Gentleman agree that we should stick to our knitting? The regulations are a short-term device to get us from A to B. We do not have to consider all the legislation and the whole purpose of leaving the EU with regard to this short piece of legislation.

Mr Jones: I say to the hon. Lady that the devil is in the detail. I have sat on a number of these SI Committees and I always like to contribute, because we need to scrutinise them, as their implications are important. They may well be small in terms of their overall impact, but cumulatively, they have an impact. I have sat on many such Committees because of the withdrawal from the EU, and the impact of this SI, without the cover legislation, will be that we are disadvantaged. My plea to the Government is to bring that Bill forward before Christmas—before we leave—because we are going to leave and it will leave us at a disadvantage.

I reiterate the main point, which is, whether the hon. Lady likes it or not, we need to co-operate with everyone in the world to make sure that it is to our advantage and that we are not at a disadvantage in cross-border trade and investment, which is a fact of life. She might not like co-operating with those nasty Europeans, but unfortunately, she will find that, come 31 December, we will have to.

Jane Hunt: I thank the right hon. Gentleman for giving way again. This is a device for getting from A to B, and nothing else. I do not agree with his

comment about “nasty Europeans” either—most decidedly. I am one of those Back Benchers that he is talking about, but I do not agree with that phrase.

Mr Jones: It gets from A to B; I do not disagree with the hon. Lady on that, but where is C? Where is the ultimate destination? That is the point, which the Minister has not answered. If we do not have that Bill before us before we end the transition period, we will be at a disadvantage.

This process of withdrawal will not be easy, because there will be huge complications in terms of numerous things that will come up in a number of years, which will hit us in the face. In terms of the security of our country, the idea that we can get investment from individuals—some parts of the Conservative party might welcome that, but my party will not—who we should not [*Interruption.*]. The hon. Member for Bolsover laughs, but, I am sorry, he should just look at some of the donations taken by his own party from individuals whom I would not want to be associated with, but that is another matter.

If the Minister can assure us that the Bill will be in before Christmas, that will be fine. It makes practical sense to agree this today, but it is important that we have that Bill before we end the transition period.

9.51 am

Mr Harper: I have one question and one point. I am conscious of your injunction, Mrs Miller, to stick to the subject. This is directly related to points that are made in the explanatory statement.

I disagree with the hon. Gentleman about the future framework—

Mr Jones: Right hon.

Mr Harper: The right hon. Gentleman. I disagree with him on the compulsory nature of the information sharing. I am perfectly happy with a co-operative framework. The point I was driving at—I think this is the substance of the regulations—is that in order for the CMA to share information, it has to have the power to share the information. If it shared the information, even if it wants to, that would be unlawful; it does not have the power to do that sharing.

My point, which I think is different from that of the right hon. Gentleman, is that I am perfectly relaxed that we are not able to compel European Union member states, post the transition period, to share information with us, because I am content that they should not be able to compel us to share information with them. I do, however, want to see a structure where we co-operate with them, so that where we choose to share information with them, we are empowered to do so. The regulations specifically address allowing us to share information.

My question to the Minister is about what is intended to come afterwards. Do we intend to replicate the ability for us to share information where we choose to do so? That is a different point from that made by the right hon. Gentleman, which, I think, is about some element of compulsion.

My second point is that the explanatory notes explicitly say that the intention is to revoke not just the instrument we are debating today but the retained version of the foreign direct investment regulations in their entirety at

[Mr Harper]

the end of the transition period. Paragraph 7.1 of the explanatory memorandum states that the FDI regulations do not

“affect the UK’s ability to screen investments into the UK”

because we will retain our own responsibility for national security. Once we have removed those FDI regulations, do we currently have domestic powers to do that screening, or is that what the new Bill is for?

That is an important question, because if we currently have powers and the new piece of legislation the Minister refers to is about strengthening or extending them, I am fairly relaxed about whether there is a gap before the Bill comes into force, because if we already have substantial powers and we are talking about beefing them up, I can live with there being a gap. If we revoke the FDI regulations on 31 December, however—and with them, our current ability to do screening for our own national security—the right hon. Member for North Durham is right to say that we would need the new legislation to come into force immediately upon their revocation or there would be a gap, not just in the sharing of information, but in our own national security. That is a point on which I differ from the right hon. Gentleman, but also one very specific question that pertains to points in the explanatory note.

9.55 am

Paul Scully: I thank the Committee for its consideration and for the points that have been raised during the debate, which I will try to address. The hon. Member for Manchester Central talked about the CMA and small businesses. Clearly, it is important that we give due consideration to the pressures on small businesses, especially at this particular time. The CMA understands that this is a challenging time for small businesses and encourages them to approach it as soon as possible if they foresee difficulties in meeting the deadline, so that the information request or stipulated response dates can be varied where appropriate. It is important that the CMA works with small businesses in that regard.

The right hon. Member for North Durham raised a few points. On the question of co-operation with the EU, as I have stated, the EU and the UK have said that they both want to co-operate where appropriate. On information sharing, we must not forget that the EU does not equal the rest of the world. It is an important partner for trade, for security and for any number of issues on which we must continue to co-operate, but as we do so, we need to retain our sovereignty at the end of the transition phase, having left the EU in January. The Opposition effectively did not want to bring Parliament back as a result of covid; we wanted to come back so that we could progress the legislation at pace, and we have done a lot since then. The right hon. Gentleman asked whether the legislation places us at a disadvantage.

The Enterprise Act already has information-gathering powers when there has been a public interest intervention notice, so we will have the power to share information, as we do now, after the implementation phase.

As I have said, the UK and the EU have stated their intention to support ambitious, close and lasting co-operation. My right hon. Friend the Member for Forest of Dean asked whether Ministers will be able to share information about mergers after December. Yes; that is planned in the National Security and Investment Bill, so we will be able to share information about mergers after that point.

Mr Jones: What happens during the gap between these regulations falling and the Bill coming in?

Paul Scully: The right hon. Gentleman is talking about a future Bill. If he is happy to work with us, we can make sure that the Bill progresses at pace. We have been introducing a lot of new legislation at pace to respond to covid, and we can do the same with the Bill. We have all learned from the pandemic how to work more closely together when it is in the national interest, instead of playing politics with some of this stuff, and we have moved at pace. The right hon. Gentleman suggests that there will be a gap, but that is not necessarily within the scope of the debate or our intention.

Mr Jones: That is a bit rich. I do not control the legislative programme of the House or the Government. The Minister has only to look at the programme for the last few weeks: Opposition days, general debates and the debates on estimates that we have had for the last two days. The idea that there is not enough time—and blaming the Opposition for it—is frankly a bit rich. It is down to the Government to bring the legislation forward.

The Chair: Order. Can we keep interventions to the subject of the debate?

Mr Jones: He raised it!

Paul Scully: To be fair, I was responding. The UK’s investment screening process will continue to operate as it does now, with a few additional steps to ensure that we comply with the regulations. Our sovereign capabilities to intervene in a merger will not be affected. I commend the regulations to the Committee.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020.

10 am

Committee rose.