SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL

Government Response to the Delegated Powers and Regulatory Reform Committee's Eleventh and Thirteenth Reports of Session 2014-15

Introduction

1. The Government is grateful to the Committee for its reports on the Small Business, Enterprise and Employment Bill, which form a valuable part of the scrutiny of the Bill. The Government wishes to respond to the substantive points raised by the Committee before the Bill is considered at Report stage, in order to inform that debate.

Responses to recommendations

2. The Committee Report makes fourteen recommendations responses to which are below *(clause numbers used relate to the Bill print as amended in Grand Committee)*. Eight of these were recommendations that regulations contained within the Bill clauses should be subject to the affirmative procedure. The Government accepts all of those recommendations and has made amendments in Committee or tabled amendments for Report Stage accordingly. The recommendations covered:
    - Clauses 4 and 5 (Provision of Financial Information about small and medium sized businesses);
    - Clause 7 (Power to amend the figure for annual turnover of a small or medium sized business);
    - Clause 10 (Disclosure of information affecting the export of goods);
    - Clause 35 (Home Business Tenancies under Part 2 of the Landlord and Tenant Act 1954);
    - Clause 39 (Regulations about public sector procurement)
    - Clause 43 (Market rent only option for large pub-owning businesses);
    - Clause 87 (Power to provide for exceptions from the requirements that directs must be natural persons); and
    - Clause 106 (Matters to be taken into account in determining unfitness to be a Director)

3. Further, the Government accepts the recommendation that the power at paragraph 2 of Schedule 3 (guidance about the meaning of significant influence or control) should be subject to the draft negative procedure, and has tabled amendments accordingly for consideration at Report Stage.

4. On the remaining five recommendations, the Government has the following response.

The Pubs Code – De-hybridising provision (clause 73 (3))

5. The 13th Report raised the following concerns about the lack of consultation requirement in the Bill to address the interest of pub franchisees which would otherwise be protected by the hybrid instruments procedure. This is specifically dis-applied by clause 73(3).

6. *"It is usual for the Committee to draw a provision of the kind made by clause 73(3) to the attention of the House so that it can satisfy itself that any interests that would normally be afforded protection by the hybrid instruments procedure are afforded appropriate protection by some other means – for example, by consultation while the policy underlying the draft is still at a formative stage. In this case there is no requirement on the face of the Bill for consultation or any other means for protecting private interests. The Department states in paragraph 181 of the memorandum that in this case the Government is satisfied that the private interests of franchises will be sufficiently protected because they will not inadvertently fall within the provisions of the Pubs Code. We have found it difficult to make any assessment of this on the basis of the limited information provided by the Department in its memorandum.* ***Accordingly, as well as drawing the de-hybridising provision to the attention of the House, we also draw attention to the fact that the Bill does not include any express requirement for consultation, or any other means for protecting interests which would otherwise be protected by the hybrid instruments procedure."***

7. The Government notes that, although there is no express requirement for consultation in the Bill so as to protect those interests that would otherwise be protected by the hybrid instruments procedure, it has, and is, committed to consulting on the relevant issues that would otherwise be protected. Such commitments have been given by Matthew Hancock, during Commons Second Reading of the Bill on 16 July 2014, and by Jo Swinson during Commons Committee on 28 October 2014 and at Commons Report on 18 November 2014. In addition, at Lords Committee on 28 January 2015, Baroness Neville-Rolfe specifically gave a commitment to consult in relation to using the power in clause 71, to which clause 73(3) relates. The Minister advised that the Government intended to use the power in clause 71 to exclude from the Code tenancies at will and temporary agreements that do not extend beyond a certain limited period and specifically stated "this does not require an amendment to the Bill but, as part of the consultation on secondary legislation, we will consult on the length of agreements that should be exempted".

8. The Government acknowledges the Committee's concern but, in view of the commitments given, and outlined above, to consult before using the power in clause 71 to exempt a particular type of tenant or premises from the Pubs Code by secondary legislation, it hopes this alleviates their concerns.

Decisions by creditors and contributories in company insolvency proceedings (clauses 122 and 123)

9. The 13th Report of the Committee contained the following concerns relating to the Insolvency provisions in the Bill, specifically covering clauses 122 and 123:

10. *"Clause 122, together with Schedule 9, amends the Insolvency Act 1986 to remove the requirement for decisions in relation to company insolvency proceedings to be made at meetings of the creditors and contributories of a company. This is generally achieved by amending the provisions of that Act, which require the holding of meetings of creditors or contributories to decide matters, so that instead they provide for matters to be decided by the creditors or contributories, without any express reference as to how a decision is to be made.*

11. *Sections 246ZE and 246ZF of the Insolvency Act 1986 (both of which are inserted by clause 119) contain provisions which apply generally to regulate how decisions of creditors and contributories are to be made. There is provision for a deemed consent procedure, under which the person with conduct of the insolvency proceedings proposes a decision which has effect unless a prescribed proportion of creditors or contributories object. Otherwise, decisions of creditors and contributories are to be taken by means of a qualifying decision procedure. Sections 246ZE and 246ZF in essence set out the framework for the making of decisions by creditors and contributories. The detailed provisions will be contained in insolvency rules made under section 411 of the Insolvency Act 1986. For example, insolvency rules will make provision about qualifying decision procedures, about the circumstances in which a particular kind of qualifying decision procedure may or may not be used and about the proportion of creditors or contributories for requiring a decision to be taken at a meeting. Insolvency rules will also be able to make provision about the circumstances in which the deemed consent procedure may not be used and about the proportion of creditors or contributories required to object to a proposed decision under the deemed consent procedure.*

12. *Clause 123 makes similar changes to the Insolvency Act 1986 in relation to individual insolvency. Again the amendments have the effect of removing the requirement for decisions of creditors to be taken at meetings; and enable other decision making procedures to be used instead, including a deemed consent procedure. As with the provisions inserted by clause 122, the detailed matters relating to the decision making procedures of creditors will fall to be set out in insolvency rules under section 412 of the Insolvency Act 2006.*

13. *Insolvency rules under section 411 and 412 of the Insolvency Act 2006 are subject to the negative procedure, and accordingly the detailed provision to be made about the use of qualifying decision procedures and the deemed consent procedure will be contained in rules subject to the negative procedure. In paragraph 415 of the memorandum, the Department suggests that the negative procedure is appropriate because that is the procedure which applies generally to insolvency rules.* ***Despite this, it seems to us that there is a strong case for requiring the affirmative procedure to be used for the first exercise of the powers to make rules about qualifying decision procedures and the deemed consent procedure. The new provisions represent an important structural change in the conduct of insolvency proceedings, with most of the detailed provisions governing the operation of the new system to be set out in subordinate legislation."***

14. The Government acknowledges the concerns raised by the Committee in relation to clauses 122 and 123, which seek to make changes to the way in which decisions in insolvency cases are made. In response the Government will be tabling amendments that will enable greater Parliamentary scrutiny on important aspects of this policy.

15. As currently drafted, the proportion of creditors (and contributories, in a company's insolvency) which could (a) request a physical meeting or (b) object to a decision under the deemed consent procedure is to be set in the Insolvency Rules. Although Insolvency Rules are subject only to the negative parliamentary procedure, they also benefit from the scrutiny of the Insolvency Rules Committee, made up of members of the judiciary, legal and accountancy profession. This Committee is to some extent akin to the Civil Procedure Rule Committee which makes rules of court. Where they affect court procedure, Insolvency Rules are also made with the concurrence of the Lord Chief Justice.

16. The Government amendments will set out in clauses 122 and 123 the proportion or number of creditors or contributories required to request a physical meeting and/or to object to a decision on deemed consent. Powers will also enable changes to these proportions/numbers by way of regulations subject to the affirmative procedure. We will be working with stakeholders to assess what the proportions should be, but are currently minded to consider proportions by value and by number.

17. These proposed amendments will give these very important aspects of the decision making provisions sufficient scrutiny without changing what we consider to be the appropriate present scrutiny for making Insolvency Rules.

Public sector exit payments (clause 152)

18. The 13th Report of the Committee set out the Committee's concerns on clause 152 (Powers to require repayment of public sector exit payments) as follows:

19. *"Clause 152(1) allows the making of regulations to require the repayment of some or all of a payment made to a public sector employee on leaving employment. The kinds of exit payment to which the regulations apply, the circumstances in which repayment is to be made, and the public sector employments to which the regulations apply are all to be provided for in the regulations themselves. Examples are given in subsection (4) of the kinds of exit payment which may be included within the scope of the regulations. But these constitute a non-exhaustive list. Similarly, clause 153(1) identifies particular circumstances in which a requirement to repay may be imposed. These are where a former public sector employee subsequently becomes an employee or contractor of a public sector authority or a holder of a public sector office. However, the circumstances identified in clause 153(1) are not exhaustive of the circumstances in which repayment can be required.*

20. *As well as providing for regulations to be able to require repayment of qualifying exit payments, subsection (2) of clause 152 also allows the regulations to make*

"such other provision in connection with qualifying exit payments as the Treasury think fit".

21. *The stated reason for including the powers conferred by clause 152(1) (see paragraph 519 of the memorandum) is to allow the recovery of some or all of an exit payment from a worker who returns to work in the public sector. The supporting explanation in paragraphs 520 to 524 also makes it clear that the intention is to enable the recovery of an exit payment where the worker returns to public sector employment (whether as a public sector employee, an office holder or as a contractor of a public sector authority). However, no explanation is given as to why, if the sole purpose of the power is to allow for recovery of exit payments where a person returns to public sector employment, the power conferred by clause 152(1) is framed far more widely so as to allow any description of exit payment to be recovered in any circumstances. Also, no explanation is given as to why the very broad powers conferred by clause 152(2) are required.*

22. *Regulations under clause 152 are subject to the negative procedure. We find it very difficult to accept that the negative procedure is appropriate given the wide and open-ended nature of the powers being conferred. But more importantly we are not convinced that the delegation of powers is appropriate, particularly in the absence of any explanation for the breadth of the powers being conferred. Clause 152(1) places no limit on the kinds of circumstances in which a requirement to repay an exit payment might be imposed or after what period repayment might be required. Nor is there any limit on the types of exit payment to which the requirement to repay might be applied. Clause 149(4) provides a very wide-ranging list of the kinds of payment but even that is not exhaustive.* ***Accordingly, we recommend that the House seek further explanation from the Minister as to the scope of the powers conferred by clause 152, how they will be exercised and why they provide for repayment in circumstances other than those referred to in the memorandum. In our view, clause 152 as it stands constitutes an inappropriate delegation of powers.*** *"*

23. The Government acknowledges the Committee's concerns about the extent of the power. The Committee may be aware that at the time the Bill was introduced into Parliament, a consultation on the scope and extent of the clauses was ongoing. The clauses were drafted widely in order to accommodate all possible outcomes of that consultation.

24. The consultation process has now finished, and the policy has been settled. In order to address the Committee's concern about the scope of the power, we have now brought forward amendments at Lords Report to limit the scope to the stated intent. They replace "prescribed circumstances" in clause 152(1) with "qualifying circumstances", and insert at clause 153 a definition of "qualifying circumstances" that limits the power to make regulations to recovery of payments to exit payees only when they return to public service work within the year after they left.

25. The definition of "qualifying circumstances" does allow other circumstances to be prescribed. This is in order to enable the regulations to make provision in line

with the Government's policy of recovery only when the exit payee returns to work in the same part of the public sector (for example, within local government). Given that this is subordinate to the requirement for return within the year after leaving, we do not think it expands the power beyond the stated intent.

26. The Government's considers that this express limitation narrows the scope of the power to hope that this express restriction addresses the Committee's concerns about scope.

27. We also draw the Committee's attention to the draft regulations we have published, which illustrate how the Government intends to use the power. They are available online with a covering note at: https://www.gov.uk/government/consultations/recovery-of-public-sector-exit-payments

28. We note that, at paragraph 15, the Committee also commented that the list of exit payments at clause 152(4) was not exhaustive. The Government would like to confirm that this is intentional. The Government needs the ability to respond swiftly to future changes in employment and remunerative policy. We are unable to predict what new types of exit payments may be made in future, and need to be able to amend the regulations to cover them so that exit payees do not take advantage of such developments to frustrate the clear intention of recovery. Given that our amendments expressly limit recovery to exit payees who return within a year of leaving, we do not think that this goes beyond the stated policy intent.

29. Finally, we note that the Committee found it difficult to accept that the negative procedure was appropriate given the "wide and open-ended nature of the powers being conferred". We hope that the express limitation of the scope will answer this concern.

30. In relation to procedure, we would also like to note that:

    a) This is consistent with the fact that the negative procedure is already used to create instruments which deal with exit payments.
    b) The exit payment regulations, as can be seen from the draft regulations we have published, will be detailed and technical in nature. The negative procedure itself allows any member of the House to pray against the regulations if it is thought that they need drawing to the attention of the House. Given all of that, we do not consider that it would be the best use of Parliamentary time to use the affirmative procedure.
    c) The clauses do not provide any unfettered Henry VIII powers. The exit payment regulations will not be able to make any consequential amendment without using the affirmative procedure due to clause 156(3) of the Bill.
    d) The Committee's counterpart in the Scottish Parliament raised a similar question about the affirmative procedure, and appear to be content with the explanation provided by the Scottish Ministers, which was in live with the summary at (a) to (c)

31. We hope that the amendments tabled, together with the explanation above, will answer the Committee's concerns.

General provisions (clause 156)

32. The Government has carefully considered the concerns of the Committee about Clause 156, the power to "otherwise modify" primary legislation. These were set out at paragraphs 18 to 23 of the thirteenth report.

33. The Government accepts the general principle that changes made to primary legislation by secondary legislation should be subject to the affirmative procedure. The nature of legislative drafting these days is such that, in the interests of clarity (and being helpful to the reader), changes to primary legislation are, wherever possible, made by textual amendment. In line with this, clause 156(3) provides that any textual amendment to primary legislation made under the clause 156 power will be subject to the affirmative procedure.

34. The Government notes the Committee's view that the power to modify primary legislation otherwise than by textual amendment should also be subject to the affirmative procedure but does not intend to accept this recommendation since it believes that doing so would create legal uncertainty. This is because there are outlying cases where it is not always clear when a provision non-textually modifies primary legislation. Such modifications can be really quite indirect. Examples of indirect modifications include:

    a. regulations which amend other secondary legislation to add to a list of bodies to be treated as "public authorities" for the purposes of a particular Act – this will alter the effect of that Act and therefore "otherwise modify" that Act;

    b. regulations which make free-standing provision which alters the effect of primary legislation, for example a provision about the service of notices in a particular case could be such as to create a contrary intention for the purposes of section 7 of the Interpretation Act 1978, and so modifies the effect of that Act.

35. Given that there are cases where it will not be clear whether a provision of regulations non-textually modifies primary legislation, requiring such a modification to be subject to the affirmative procedure would mean that there would be cases where it was not clear which procedure needed to be used. This would create a level of legal uncertainty that would be highly undesirable. In addition, the Government thinks that many of the cases that fall into this category are unlikely to warrant the use of the affirmative procedure in any event (because of their indirect/remote nature)

36. In the Government's view it is not possible to set out on the face of the Bill the particular kinds of such modifications which only require the negative procedure. The Government is not suggesting that all non-textual modifications should be subject to the negative procedure. But that:

a. there will be provisions which can be seen as non-textual modifications for which that is true,

b. they are impossible to describe in general words (at least without introducing the concept of a Minister exercising his or her judgment on the point), and

c. drafting practice is such that, wherever possible, non-textual modifications are avoided in favour of textual amendment, which means that, as a general rule, a case where a non-textual modification which is of the same "weight" as a textual amendment is made will be rare.

37. The Government has undertaken to the Committee that, on those rare occasions, it will exercise its power to combine instruments to include the modification in an affirmative instrument. The Government recognises that this amounts to conferring discretion on Ministers to decide whether a particular **non-textual** modification of primary legislation warrants the negative or affirmative procedure, but given the limited occasions on which substantive provision would be made by such a modification and given that it can be unclear whether a provision non-textually modifies primary legislation in some remote way**, the Government thinks that this position is justified.**

"Rolling-up" of different scrutiny procedures (clause 159)

38. The report commented on clause 159(5) and (6), described as the "rolling-up" of different scrutiny procedures for regulation making powers, by reference to its comments on the equivalent provisions at clause 21(7) and (8) of the Recall of MP's Bill, at paragraphs 23 to 27 of the eleventh report.

39. A provision, which under the Bill is subject to no procedure may be made by regulations subject to the negative or affirmative procedure, and a provision which under the Bill is subject to the negative procedure may be made by regulations subject to the affirmative procedure. The Report stated in particular:

40. "*Subsections (7) and (8) of clause 21 provide for an approach to the use of Parliamentary scrutiny procedures that appears to us to be unconventional in its extent. Taken together, the two subsections would allow powers that attract the affirmative procedure, powers that attract the negative procedure and powers that are not subject to any form of Parliamentary scrutiny to be exercisable in a single affirmative instrument.*

41. *We do not therefore believe that there should be any systematic extension of the present piecemeal and occasional flexibility whereby 'negative' provision may in appropriate circumstances be included in an affirmative instrument. We would be very concerned if the practices envisaged by subsections (7) and (8) of clause 21 were to become a commonplace feature of the arrangements for making statutory instruments, and for those subsections to be replicated as a matter of course in government Bills… We are aware of an initiative on the part of the Government, as part of its well-publicised drive for 'de-regulation', to reduce the numbers of*

statutory instruments, and we do not know whether subsections (7) and (8) are a feature of that initiative; but we are quite sure that it would be wrong in principle for any reduction in the numbers of instruments to be achieved at the expense of their effective Parliamentary scrutiny. ***We draw these concerns to the attention of the House."***

42. The Government has implemented an ambitious deregulatory programme which has delivered savings of £10 billion to UK businesses over the last 4 years. Reducing the numbers of SIs made by rolling together contents that would ordinarily be in different instruments would, in itself, have no deregulatory effect[1]. The Government measures the impact of deregulation according to the associated costs or savings to business, rather than the number of instruments involved.

43. Clearly, this Bill contains a number of different regulation-making powers. However, the Government notes that the ability to combine instruments so that some provisions are subject to a great level of scrutiny than is actually required is quite commonplace in legislation - see, for example, section 97(3) & (4) of the Counter-terrorism Act 2008 (which is in a similar form to clause 21(7) & (8)), section 24(3) of the Public Service Pensions Act 2013 or section 125(4) of the Care Act 2014.

44. The Government considers that the flexibility conferred by clause 159(5) and (6) enables the combination of instruments where doing so is sensible in terms of helping the users of legislation to access and understand the legal framework (by, essentially, putting relevant material "in the same place"). That flexibility **cannot** be used to diminish the level of scrutiny set by Parliament

45. The report states the concern that combining instruments may put the House in the difficult position of having to decide not to approve (or to annul) an instrument merely because some of the provisions are objectionable, when the rest are unobjectionable/desirable.

46. The Government accepts that the risk of that happening is something that the Minister would need to consider before deciding whether to proceed with a combined instrument. The House should not, therefore, feel cornered on this basis about approving something that they would not otherwise approve.

47. Any decision by a Minister to exercise the option to combine provisions to which various procedures apply means a higher level of scrutiny would apply to some provisions than will ordinarily be the case – and so the level of scrutiny set by

[1] The glossary of the Better Regulation Framework Manual defines deregulation/deregulatory as: "To have the effect of reducing the scope of government regulation, including the removal of existing regulation, or amendment / recasting that reduces the scope of existing regulation" www.gov.uk/government/uploads/system/uploads/attachment_data/file/211981/bis-13-1038-better-regulation-framework-manual-guidance-for-officials.pdf

Parliament is not diminished. Parliament would be given a greater role in scrutinising such provisions, and if that scrutiny runs the risk that an instrument is not approved or is annulled as a result, that is a risk a Minister can choose to take if viewed to be appropriate and sensible.

48. The Government therefore notes the Committee's concerns, but believes that the approach taken is justified.

Department for Business, Innovation and Skills
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