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An Roghchoiste um Ghnóthaí Eachtracha agus Trádáil agus Cosaint
Tuarascáil maidir le An Bille um Ghníomhaíocht Eacnamaíoch a Rialú
(Críocha faoi Fhorghabháil)

2018 [PMB]

Nollaig 2019

Houses of the Oireachtas

Select Committee on Foreign Affairs and Trade and Defence
Report on Detailed Scrutiny of Control of Economic Activity
(Occupied Territories) Bill 2018 [PMB]

December 2019

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Table of Contents

Introduction	2
Meetings and Engagements as part of Detailed Scrutiny	2
Procedural basis for Scrutiny	2
Overall aim for the Bill	3
Main provisions of the Bill	3
Detailed scrutiny process undertaken	3
Issues arising	4
Legal Analysis	6
Constitutionality	6
Drafting ambiguities and unintended consequences	6
EU Law	6
Cost Analysis	7
Observations and Conclusion	8
Appendix 1 – Committee Membership	9
Appendix 2 – Terms of Reference of Committee	10

Introduction

This is the report of the Select Committee on Foreign Affairs and Trade, and Defence following its detailed scrutiny of the Control of Economic Activity (Occupied Territories) Bill 2018.

The Bill was referred to the Select Committee on Foreign Affairs and Trade, and Defence by order of the Dáil of 5th February 2019. The Select Committee decided to conduct Detailed Scrutiny of the Bill before order for Committee Stage is moved.

Meetings and Engagements as part of Detailed Scrutiny

- **12 February 2019** - Select Committee meeting to determine and design detailed scrutiny process to be undertaken. The Select Committee also agreed to seek briefing from the Library and Research Service.
- **28 March 2019** - Select Committee meeting to discuss briefing paper from Library and Research Service. The Committee also concluded on whether to hear oral evidence or to request written submissions from selected stakeholders.
- **18 April 2019** - Agreed list of stakeholders to be invited to make submissions.
- **13 June 2019** - Written submissions received and considered by the Committee. Agreed at this meeting to seek the advice of the Office of the Parliamentary Legal Advisor.
- **17 October 2019** – Presentation by Principal Officer with responsibility for Private Members Bill in the Office of Parliamentary Legal Advisor on the legal opinion provided.

Procedural basis for Scrutiny

- Private Members Bills referred to Select Committee are subject to the provisions of Standing Order 141 (2) [Dáil] which provides that a Select Committee “*shall undertake detailed scrutiny of the provisions of such Bills....and shall report thereon to the Dáil prior to Committee stage consideration....*” unless the Committee decides in relation to a particular Bill that detailed scrutiny is not necessary.
- The Memorandum of Understanding between the Government and Dáil Éireann on Private Members’ Bills (adopted by the sub-Committee on Dáil Reform on 5 December 2018).

Overall aim for the Bill

The purpose of the legislation is to prohibit the import or sale of a good or service originating in an occupied territory or to extract resources from an occupied territory in certain circumstances.

Main provisions of the Bill

A summary of the main provisions of the Bill are:

Part 1 - Preliminary and General: Definitions and Concepts used in the Bill, such as “occupied territory” along with mechanisms for Ministers to make regulations to enable the provisions of the Bill to have full effect

Part 2 - Settlement Goods, Service and Natural Resources:

This provides (i) the extra-territorial scope of the Bill

(ii) a full list of economic activities within the scope of the Bill

Part 3 - Penalties and Defences:

- (i) the penalties for parties found guilty of being in breach of the provisions of the Bill
- (ii) the receivable arguments a person charged with an offence relating to the Bill can use a defence.

Detailed scrutiny process undertaken

In accordance with Appendix 2 - Committee scrutiny process model for Private Members' Bills (PMBs) in the Memorandum of Understanding (MOU) - the Committee agreed to invite written submissions from several groups. Members of the Committee were invited to suggest groups for inclusion in this stage of the process. Ten different groups were identified, and the Committee agreed to invite all of them to make a submission in relation to the Bill. Those invited to make submissions were asked to do so based on the twenty questions set out in Appendix 3 of the MOU and to respond to all or those questions relevant to them. The groups invited were, the Ireland Palestinian Solidarity Group, Mr. Gerry Liston, Global Legal Action Network, H.E. Ambassador Ophir Kariv, Embassy of the State of Israel in Ireland, Al-Haq, Ireland-Israel Alliance, the European Commission, Sadaka, American Chamber of Commerce, Mr. Michael Lynn Senior Counsel and the Department of Foreign Affairs and Trade. The selection offered a fair balance to those groups and organisations which expressed an interest in the progress of the Bill.

Issues arising

Submissions in some cases addressed some or all the questions. However, a number of the submissions also outlined either their support or opposition to the proposed Bill. Key points contained in the submissions are summarized below:

“The Bill does not give clarity to a number of issues including EU Treaty Compatibility, the Scope of the Provisions, applicability to holding companies and trade and investment relations.” - American Chamber of Commerce

“Strongly welcomes the Occupied Territories Bill 2018, which according to them gives effect to Ireland’s obligations under Common Article 1 of the Geneva Conventions, which requires State parties to “respect and to ensure respect for” the Fourth Geneva Convention in all circumstances.” - Al-Haq

“It is not open to Ireland, as an EU Member State, to impose unilateral trade restrictions on any country or territory. As outlined below, trade is an exclusive competence of the European Union and it is not possible for Ireland or any other Member State to impose import restrictions outside of the EU framework.” - The Department of Foreign Affairs and Trade

“...the EU’s commitment to the ‘strict observance’ of international law is such that ‘public policy’ for the purpose of Regulation 260/2009 would permit the prohibition of the import of produce which originates from the illegal settlements. A Member State would be justified, as a consequence of its determination to uphold international law (to which the EU is committed) by not acquiescing in any way with the continuation of the illegal settlements, by banning the import of produce from there.” – Mr. Michael Lynn, Senior Counsel

“The Bill seeks to prejudge any future agreement between Israel and the Palestinians which by definition will necessitate addressing highly complex issues.” - The Embassy of Israel in Ireland

“It will make a strong statement that Ireland is willing to act in defence of international law and in support of the human rights of the Palestinian people. Action from the global community, and action alone, will send a strong message to the state of Israel that it can no longer act with impunity for its sustained war crimes and persistent breaches of international law.” - SADAKA and Mr. Gerry Liston

“The EU has exclusive competence on the common commercial policy also referred to as trade policy, as provided by the Treaty on the Functioning of the EU (Articles 3.1(e) and 207 TFEU), establishing a common commercial policy. As a customs union, the EU applies common arrangements for imports of goods from third countries uniformly across the Union. In principle, only the EU can decide to prohibit the importation of goods and services and not the Member States individually. In the absence of an express authorisation by the EU, in general Member States or their infra-national territorial units such as regions cannot adopt own national rules in this respect (Article 2(1) TFEU) and must comply with Regulation 2015/478 of 11 March 2015 that sets out the detailed general EU Common Rules for imports.” - The European Commission

“The Control of Economic Activities (Occupied Territories) Bill....seeks to address the serious problem of profiteering from illegal settlements in territories that are recognised as being occupied in international law. Allowing such entities to trade freely violates states’ duties of non-recognition of and non-assistance to serious breaches of international law.”

- The Ireland Palestine Solidarity campaign

“The Bill is discriminatory. It pretends to relate to occupied territories generally but has been carefully drafted so as to apply automatically only to the disputed West Bank territory - even though there are many other disputed territories around the world in which nationals of the state that administers them have been permitted to settle.” - The Ireland-Israel Alliance

Full submissions from stakeholders are available at -
https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_foreign_affairs_and_trade_and_defence/submissions/2019/2019-12-18_submissions-detailed-scrutiny-of-economic-activity-occupied-territories-bill-2018_en.pdf

Legal Analysis

The detailed scrutiny process included a legal analysis of the Bill, in accordance with the Framework for Committee Scrutiny of PMBs contained in the Memorandum of Understanding between the Government and Dáil Éireann on Private Members' Bills, included in Appendix 3. This included input from the Office of the Parliamentary Legal Advisor, as well as from the written submissions of the listed stakeholders. The issues raised are summarised briefly below. The Committee believes that these issues could be best addressed, where appropriate, by way of amendment at Third Stage and notes the willingness of the Bill's sponsors to work proactively with the Committee to do so.

Constitutionality

The opinion of the OPLA is that Section 4 of the Bill could be susceptible to a constitutional challenge, on the basis that it may provide for an overly broad delegation of powers to the Executive. Section 3 of the Bill requires the Minister for Foreign Affairs and Trade to list territories that have been confirmed as constituting a "relevant occupied territory" by three international bodies, and may also be susceptible to a constitutional challenge on the basis of an overly broad delegation of power.

Drafting ambiguities and unintended consequences

Ambiguities in the drafting were highlighted by the OPLA. Concern was expressed in relation to the definition of a "*relevant occupied territory*" (Section 3) and of "illegal settler", "occupying power", "settlement goods" and settlement service" (Section 2). These terms, as well as the related offences and defences (Sections 6-11) will need to be sufficiently precise to enable the effective administration and implementation of the provisions of the Bill (including any prosecutions/litigation). Concern was also expressed in relation to practical difficulties arising out of the section 5 which deals with extra-territorial application.

EU Law

As noted by the OPLA, Article 3 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union shall have exclusive competence in the area of common commercial policy. However, Article 24 of EU regulation 2015/478 allows for Member States to adopt more restrictive import measures on the grounds of public morality, public policy or the protection of health and life of humans. In the absence of a legal decision from the ECJ and in terms of the legal analysis of the Bill it is noted that measures proposed in the Bill may fall within the '*public policy*' grounds provided in Article 24 of Regulation 2015/478. This could ultimately be a decision for the Court of Justice of the European Union, if the Bill is enacted.

The Committee understands the view that even if the Bill is found by the Court of Justice not to fall within the “public policy” ground, this may not give rise to fines and damages claims unless the Government of the day then fails to amend or repeal the Bill pursuant to its powers under the European Communities Act, 1972. The Government has suggested in its submission to the Committee that Dáil approval would be required for any such measure adopted by the Government in accordance with Section 3A of the European Communities Act. However, Section 3A only applies where the measure adopted by the Government creates an offence or increases a penalty for an existing offence. Never has it been suggested, by the Government or otherwise, that, to be brought into line with EU law, an additional offence would need to be created or that the penalties provided for in relation to the existing offences created by the Bill would need to be increased.

Cost Analysis

The detailed scrutiny process includes a cost analysis of the Bill, in accordance with the Framework for Committee Scrutiny of PMBs contained in the Memorandum of Understanding between the Government and Dáil Éireann on Private Members’ Bills, included in Appendix 3. Several of the listed stakeholders provided input on this point. The Committee notes the preliminary assessment of the Bills Office that there are costs associated with the Bill, and that a message from the Government would be required before the Bill can proceed to Third Stage in accordance with Dáil Standing Order 179(2).

On the basis of the submissions received, the Committee considers that the costs associated with the passage of the Bill may be minimal and largely administrative in nature, and as such not sufficient to require that a money message be required from the Government. If enacted, the Bill should rely on state bodies already in existence for implementation, such as the customs authorities, An Garda Síochána, and officials in the relevant Government Department. Prohibiting the import and sale of a limited number of goods falls within the existing responsibilities and standard activities already carried out by such bodies. In the Committee’s view, a determination that a money message is required would amount to an overly restrictive interpretation of Standing Order 179(2) and Article 17(2) of the Constitution. If a money message is deemed to be required, then for the same reasons the Committee recommends that the Government should grant one and allow the Bill to proceed to the next stage.

Observations and Conclusion

The Committee in its scrutiny of the Bill and pursuant to Standing Orders and the Memorandum of Understanding between the Government and Dáil Éireann on Private Members' Bills, agreed to report to the Houses of the Oireachtas that it has undertaken and completed detailed scrutiny of the Bill.

The Committee broadly welcomes the Bill and recommends that it proceed to Third (Committee) Stage for further review. The Committee believes it offers an important restatement of Ireland's commitment to international law and human rights protections, and to ensuring that these provisions are clearly reflected in our trade policy.



Brendan Smith T.D.

Chair

Select Committee on Foreign Affairs and Trade and Defence

12th December 2019

Appendix 1 – Committee Membership

Deputies:

Brendan Smith (Fianna Fáil) [Chairman]

Maureen O’Sullivan (Independents 4 Change) [Vice Chairperson]

Seán Barrett (Fine Gael)

Seán Crowe (Sinn Féin)

Noel Grealish (Rural Independents Group)

Tony McLoughlin (Fine Gael)

Niall Collins (Fianna Fáil)

Appendix 2 – Terms of Reference of Committee

JOINT COMMITTEE ON FOREIGN AFFAIRS AND TRADE AND DEFENCE

TERMS OF REFERENCE

A. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

(1) The Select Committee shall consider and report to the Dáil on—

- a) Such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
- b) European Union matters within the remit of the relevant Department or Departments.

(2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.

(3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such as —

- a) Bills,
- b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,
- c) Estimates for Public Services, and
- d) other matters

as shall be referred to the Select Committee by the Dáil, and

- e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and
- f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

- a) matters of policy and governance for which the Minister is officially responsible,
- b) public affairs administered by the Department,
- c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,
- d) Government policy and governance in respect of bodies under the aegis of the Department,
- e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,
- f) the general scheme or draft heads of any Bill,

- g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of State on any Bill enacted by the Houses of the Oireachtas,
- h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,
- i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,
- j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and
- k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—

- a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,
- b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
- c) non-legislative documents published by any EU institution in relation to EU policy matters, and
- d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.
- e) Where a Select Committee appointed pursuant to this Standing Order has been joined with a Select Committee appointed by Seanad Éireann, the Chairman of the Dáil Select Committee shall also be the Chairman of the Joint Committee.

(7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

- a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,
- b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
- c) at the invitation of the Committee, other Members of the European Parliament.

(8) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department or Departments, consider—

- a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

- b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]

(1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders; and

(2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.

(3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993; and

(4) Any matter which is being considered, or of which notice has been given of a proposal to consider, by the Joint Committee on Public Petitions in the exercise of its functions under Standing Orders [DSO 111A and SSO 104A].

(5) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by -

- a) a member of the Government or a Minister of State, or
- b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

(6) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.