

Key issues

- Politics rather than law will dictate the fate of the Bill
- Retained EU law can be amended only if a deficiency arises from the UK's withdrawal
- The Bill offers little clue as to how the Government would exercise this wide power

BREXIT: EUROPEAN UNION (WITHDRAWAL) BILL PUBLISHED

The Bill colloquially known as the Great Repeal Bill has now been published. It aims to bring existing EU law into UK law on the UK's exit day. It also seeks to confer wide powers on the Government to cure deficiencies in that retained EU law, but it gives no indication as to how those powers will in practice be exercised. The political battle awaits.

The aspirations of the (Great) Repeal Bill - now more prosaically, if accurately, called the European Union (Withdrawal) Bill - are clear and easy to state. Repeal the European Communities Act 1972 with effect from the UK's "exit day" (clause 1: done); and retain as UK law all EU law applicable in the UK immediately before exit day (clauses 2 to 6: done). There are some intricacies, even peculiarities, en route, but the destination is clear.

The real difficulty comes in the adaption of retained EU law to meet the changed circumstances of a post-Brexit UK. In providing for this, the Bill seeks to give the Government sweeping powers to prevent, remedy or mitigate any "deficiencies" in retained EU law arising from Brexit. But the Bill offers no indication as to how, or the principles on which, these powers will be exercised, and provides for limited Parliamentary supervision. Pragmatism and the need to get this huge job done before March 2019 may mean that there is little choice but to leave much of this work to the Government (listening, hopefully, to those actually affected by these laws, though there is no suggestion in the papers accompanying the Bill of any consultation prior to exercise of these powers). However, that will not prevent there being major Parliamentary and other battles over the terms of the Bill before it becomes law.

The fundamental purpose of the Bill

The Bill provides for the repeal of the European Communities Act 1972 on exit day and for the retention as part of UK law of all "EU-derived domestic legislation" and "direct EU legislation". The former is primarily secondary legislation made under the 1972 Act to implement EU directives and which would otherwise fall on the repeal of the Act. The latter consists principally of EU regulations, which are made directly applicable in UK law by the Act and which would also disappear unless expressly retained. There are limited exceptions to retention, such as the EU's Charter of Fundamental Rights and aspects of EU law not applicable to the UK (eg Schengen and the Euro).

Under the Bill, the UK's "exit day" from the EU will be determined by the Government in secondary legislation. The Government will presumably fix exit day for the beginning of 30 March 2019 (assuming that a withdrawal agreement with the EU does not come into force before then), but there is limited Parliamentary control over the date of exit.

The intricacies in the process include EU law that is not fully in force on exit day, and how retained EU law should be interpreted. The Bill provides that EU law that is in force but which has not been made applicable by exit day will not pass into UK law. Only EU law that is in full force and effect will do so. In interpreting retained EU law, the UK courts must apply CJEU case law decided prior to exit day (though the Supreme Court is given the right to depart from it), but the courts need not have regard to decisions made afterwards, though they may do if they consider it appropriate. Essentially, the courts can make up their own minds as to whether to follow post-Brexit CJEU case law or whether to branch out on their own.

The principle of the supremacy of EU law over domestic law will continue to apply to laws passed prior to exit day (clause 5). So a UK law (frequently, a tax law) passed before Brexit that is incompatible with (pre-Brexit) EU law and therefore of no effect will continue to be open to challenge on that ground after Brexit. The Government can, however, seek to pass primary legislation in order to reverse this position as regards any particular piece of domestic law, an option not available as a member of the EU.

While pre-Brexit UK legislation will continue to be open to challenge post-Brexit on the ground that it is incompatible with pre-Brexit EU law, retained EU law will not be open to challenge on the basis that it was invalid as a matter of EU law (paragraph 1 of Schedule 1, subject to regulations to the contrary). After Brexit the CJEU could strike down a piece of pre-Brexit EU legislation as ultra vires the EU, but that legislation would continue to be valid in the UK as retained EU law. However, if the UK has failed to implement a pre-Brexit EU directive, that will not give rise after Brexit to any claim for *Francovich* damages by those adversely affected (paragraph 4 of Schedule 1). The Government offers no indication of what the removal of *Frankovich* damages is really aimed at, and the scope of the rule in *Francovich* will require careful consideration.

Governmental powers regarding deficiencies in retained EU law

Sweeping up all EU law in effect on Brexit day and depositing it into UK law is easily done. The Queen's printer is even instructed by the Bill to publish all such directly applicable EU law so that it is more readily accessible (Part 1 of Schedule 5). But this retained EU law includes, for example, numerous references to EU institutions and to reciprocity between EU member states which may be incoherent after Brexit. The Bill therefore necessarily contains power for the Government to adapt retained EU law to the post-Brexit situation of the UK (this power will lapse two years after Brexit).

The powers the Bill seeks to give to the Government in clause 7(1) are wide (see the box on the right). The controlling feature is that the power is only exercisable if a deficiency "arises from the withdrawal of the United Kingdom from the EU", not merely because it is retained EU law (a change in EU law after Brexit is, however, not a deficiency for these purposes). But if a Minister can point to a deficiency arising from Brexit, the Minister then has a wide discretion as to how to remedy that deficiency, which could involve significant

Clause 7(1) of the Bill

"A Minister of the Crown may by regulation make such provision as the Minister considers appropriate to prevent, remedy or mitigate -

- (a) any failure of retained EU law to operate effectively, or
- (b) any other deficiency in retained EU law,

arising from the withdrawal of the United Kingdom from the EU."

policy decisions. The Bill does, however, prevent the use of these powers in order, for example, to create criminal offences or impose taxation.

The Bill offers examples of where retained EU law will contain deficiencies (clause 7(2)). These include

- where it is of no practical application or is redundant
- where it confers functions on EU entities
- where it includes reciprocal arrangements between EU member states which are no longer "appropriate"

The powers available to Ministers include transferring a function currently exercisable by an EU entity to a UK public authority (whether existing or set up for the purpose) or replacing, abolishing or modifying the function.

There is also a separate power for the Government to make secondary legislation implementing any withdrawal agreement reached with the EU to the extent that this is necessary before exit day. Under separate legislation, any withdrawal agreement will also require approval from Parliament.

Parliamentary scrutiny of Governmental powers

The power of the Government to redress deficiencies in retained EU law is exercisable by secondary legislation. Where this power is exercised, for example, to create a new public authority or to confer on an existing authority a function currently exercised by the EU, the Government must secure the approval of both Houses of Parliament to the secondary legislation. This process does not, however, generally allow the Houses to amend the legislation - essentially, they can take it or leave it. Where the Government chooses to redress deficiencies in other ways (eg by abolishing a function currently carried out by the EU), either House of Parliament can vote to annul the secondary legislation, but it must take the initiative to do so and must do so within forty days of the secondary legislation being laid before it.

Parliamentary scrutiny of the Bill

In order to become law, the European Union (Withdrawal) Bill must be passed by both Houses of Parliament (there is a procedure for the House of Commons to overrule the House of Lords, but that would now probably take too long). The debates on the Bill will not begin in earnest until the Autumn, and the Bill could take the rest of the year, perhaps longer, to complete its passage through Parliament.

The Government's small majority (13, including the Democratic Unionist Party) in the House of Commons, and the absence of any majority in the House of Lords, could make the Bill vulnerable. This could be from those determined to secure a hard Brexit as soon as possible, from those determined to secure the softest of Brexits (or at least to ensure that retained EU law is as little changed as possible) and/or those simply intent upon making political mischief in the hope of embarrassing, even bringing down, the Government. There is probably no majority in either House for any particular form of Brexit. Defeating the Government would require unity amongst the opposition parties, as well as something that will draw in potentially dissident Conservatives. Fragmentation amongst the pro and anti-Brexit camps would help the Government secure the passage of the Bill. Whatever happens in Parliament, the Bill could look very different as and when it passes into legislation.

Devolution

Almost a third of the Bill is occupied by provisions about the three devolved administrations in the UK (Scotland, Wales and Northern Ireland). These provisions allow the devolved administrations to adapt retained EU law in areas within their competences, and also provide for discussion as to where a common framework (now provided by the EU) remains appropriate across the UK as a whole.

The Government has said that it will seek legislative consent from the devolved assemblies for certain provisions of the Bill (including the preservation and conversion of EU law), which could increase the challenges faced by the Bill. The Westminster Parliament can ultimately override the devolved assemblies as a matter of law; the politics may be different.

Conclusion

"Certainty, continuity and control" appear to be the Government's watch words for the European Union (Withdrawal) Bill. However, the highly generalised nature of the Bill does not advance greatly the understanding of the Government's detailed plans for post-Brexit UK law. The Bill contains few principles as to how retained EU law should be interpreted or adapted (for example, references to EU law should be read as references to retained EU law). It seems that the Government intends a line by line scrutiny of all retained EU law in order to adapt it as necessary for use in the UK after Brexit, which is probably the only way the changes required can be achieved, though in some cases it will depend on the outcome of the UK's negotiations with the EU. Anyone affected by EU law needs to keep close to the Government in order to ensure that it is able to influence this process and that the changes do actually work.

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