



THE REPEAL BILL – WHAT TO WATCH OUT FOR

It has been rumoured that the UK Government will shortly lay before Parliament a ‘Repeal Bill’ (the Bill formerly known as the “Great” Repeal Bill), which will provide that EU law that was applicable to the UK immediately before Brexit continues in force as UK law after Brexit. This will mark the beginning of an unprecedented legislative exercise to domesticate, in under two years, almost the entire EU body of law, which has taken the EU sixty years to create. Lawyers will take centre stage in explaining what it all means. The Government has so far been decidedly coy as to its plans, but here are some of the key issues to watch as the Government’s legislative aims are clarified.

Who will have the power to make the amendments?

The Repeal Bill will state that on the day of Brexit the European Communities Act 1972 will be repealed but that all the EU law in force as a result of that statute will be domesticated as UK law. But EU law will require adjustment in order to ensure that its numerous laws will work effectively as UK law. What powers will be afforded to whom and in what type of secondary legislation will those adjustments be made? For example, if powers are given to the relevant Secretaries of State to make statutory instruments, how much Parliamentary scrutiny will the exercise of such powers receive? Will those powers be limited to making amendments that are strictly necessary or will they be wider, for example by reference to what is reasonable or proportionate? Will any EU law brought into UK law in this way have an expiry date?

How will mistakes be corrected?

The rush to legislate will almost certainly result in mistakes, oversights and ambiguities. Will it be possible to correct those mistakes quickly by further secondary legislation or will it be necessary to secure primary legislation,

with a resulting difficulty in obtaining sufficient Parliamentary time? Will any powers be time-limited?

How will amendments be made?

How in practice are the Repeal Bill amendments to be implemented? For example: (a) will every existing piece of legislation be amended line by line? (b) will there be overarching principles by reference to which the legislation must be interpreted? or (c) will there be a mixed approach?

How will inconsistency be avoided?

Will the Government impose a single approach to legislative amendment and interpretation or will the task be devolved to individual departments or sectors? If devolved, watch out for inconsistency where similar concepts are treated differently.

Will the UK make any changes to EU law it is ‘re-shoring’?

Will adjustments apparently needed to pass the EU body of law into UK law in fact represent changes of policy? The Government’s White Paper says that the power to use secondary legislation to

amend EU-derived law “will not aim to make major changes to policy... beyond those which are necessary to ensure the law continues to function properly on day one”, the power being confined to “enable corrections to be made to the laws that would otherwise no longer operate appropriately”. There will be scope for argument as to what policy changes can be made and what is required to make the law operate appropriately. What scope will there be to challenge a statutory instrument?

How will the UK Courts deal with CJEU case-law post Brexit?

The White Paper provides that EU law will continue to be interpreted in accordance with CJEU judgments given before Brexit, unless the Supreme Court decides otherwise. Questions arise though in relation to (a) the impact of post Brexit CJEU judgments, even if they are not fully binding; and (b) the extent to which the Supreme Court will feel inclined to overturn pre Brexit CJEU judgments impacting on EU law implemented under the Repeal Act. How will EU law incorporated into English law by the domestication process be interpreted by the English courts? Under the common law rules governing interpretation in the UK or under the more purposive EU approach?

How will the UK deal with reciprocal provisions in existing EU law?

Adopting EU laws into UK law could be problematic in areas where those laws have reciprocal effect in relation to EU members, for example Brussels I, the European Council Regulation on insolvency proceedings (the EUIR) and passporting. Will the UK continue to afford EU members rights and entitlements in the UK even if the EU no longer reciprocates in favour of the UK? Since this is part of the core negotiation package, these decisions are unlikely to be made until late in the Brexit negotiation process and so making provision for how this is to happen may be rushed and one which will require to be closely followed.

Which bodies will be appointed to undertake the activities currently undertaken by EU bodies?

Some EU law is implemented or enforced by EU bodies. The UK Government will have to provide for these activities to be assumed by UK bodies (existing or created for the purpose), and will also need to consider to what extent the designated bodies will be part of the devolved scheme of government in Scotland, Northern Ireland and Wales. Will a function be split amongst a number of UK bodies? Will each department agree on the appropriate body in the UK to undertake duties once undertaken by a single EU body?

What will the Government do about laws in force before the Brexit date but which are not scheduled to be applied until after the Brexit date?

Will these be expressly identified or will there be a broad decision about whether or not to implement and, if so, how will these decisions be tracked?

Will the UK implement new EU measures relevant to existing laws?

EU laws are often interdependent, and some laws are supplemented by subsequent laws, secondary regulations and rules. In relation to pre-existing laws which are adopted as UK law pursuant to the Repeal Act, but which are to be implemented or otherwise developed by further EU measures after the Brexit date, will the UK Government decide also to adopt these new measures? When will we know?

How will the government ensure that there is clarity about the state of the law on Brexit day?

Will the Government introduce a mechanism so that the state of English law at any given time can be ascertained with ease? In particular (a) will there will be a collection of reference materials clearly delineating what EU law was immediately before the Brexit date? (b) will there be an up to date record of how the UK

Government is causing UK law to diverge from EU law in force immediately before the Brexit date after the Brexit date?

(c) will there be a composite glossary of agreed terms for legislative interpretation? All easily accessible, say, on a Government managed and run website so as to aid certainty and the continuing robustness of English law?

Conclusion

These are just some of the issues which will arise from the unprecedented Brexit process. The Government's White Paper on the subject estimates that "the necessary corrections to the law will require between 800 and 1,000 statutory instruments", which is roughly equivalent to the number passed in a normal year. The process is therefore beset with considerable execution risk, and businesses should plan accordingly.

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