

## THE EU (WITHDRAWAL) BILL IN OCTOBER – AMENDMENTS AND DELAYS

The European Union (Withdrawal) Bill is shaping up to be one of the most controversial pieces of UK legislation in recent memory, with over 400 amendments and new clauses (NCs) proposed by MPs so far. [Our briefing](#) of 29 September 2017 looked at the amendments to the Bill proposed by MPs up to that date. Since then, over 200 further amendments have been proposed by MPs concerned about issues ranging from parliamentary sovereignty, devolution and human rights to the environment. This briefing considers the key themes in the new batch of amendments, including which amendments may cause the biggest headaches for a Government with a slim working majority in the House of Commons.

### Where are we now?

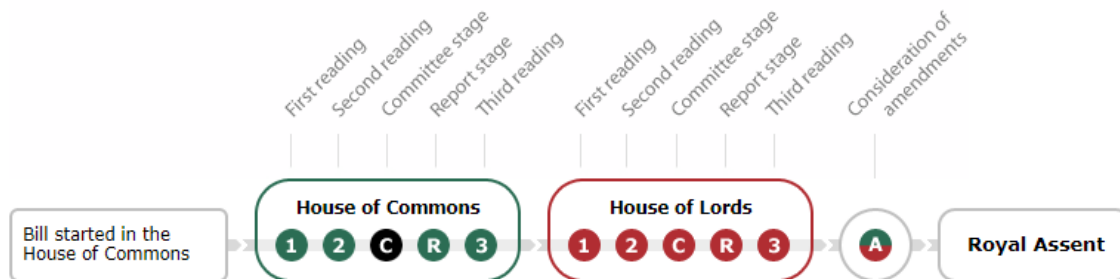
The European Union (Withdrawal) Bill passed its Second Reading in the House of Commons on 11 September 2017. The Bill was expected to start its Committee Stage before the whole House in early October, after MPs had returned from the party conference recess. That didn't happen. The Government delayed scheduling the planned eight days of debate and, on 26 October 2017, the Leader of the House of Commons, Andrea Leadsom MP, confirmed that the first two days of Committee debate would not take place until 14 and 15 November. She cited the need for the Government to "closely evaluate" proposed amendments to the Bill before commencing debate. This perhaps signifies concern on the part of the Government that it could be defeated on some of the proposed amendments, especially if Conservative rebels unite with opposition party MPs. Indeed, Labour has confirmed its intention to "work with all sides" to secure amendments on some key areas including transition, devolution and a Parliamentary vote on the Withdrawal Agreement. Defeats of the Government would, at best, be embarrassing and, at worst, could undermine the intention behind the Bill and even, ultimately, the Government's continuing existence.

The Committee Stage is the Commons' main opportunity to go through the Bill line by line and propose amendments and new clauses. The step after the Committee Stage is the Report Stage, which could see further (if more limited) opportunities to amend the Bill, followed by a final vote in the House of Commons on Third Reading. The Bill then heads to the House of Lords. The passage of the Bill through the Second Chamber may not be straightforward. The Conservative Party does not hold a majority in the House of Lords and,

### Key issues

- The Bill has been delayed to allow the Government to scrutinise the over 400 proposed amendments and new clauses.
- The first days of Committee debate will now take place in mid-November.
- Support has coalesced around some Conservative-sponsored amendments.
- Key areas that may unite Conservatives with opposition party MPs are amendments which relate to transition, parliamentary scrutiny, a vote on the Withdrawal Agreement and devolution.

whilst there is a procedure for the House of Commons to overrule the House of Lords, using it would probably take too long in this case.



**Figure 1: The stages for the passage of the Bill.**

*Image credit: www.parliament.uk*

## The Bill

The Bill seeks to repeal the European Communities Act 1972 (ECA) from the UK's "exit day" (as defined by Ministers) and to retain as UK law all EU law applicable immediately before exit day. It also aims to confer wide-ranging powers on Ministers to prevent, remedy or mitigate any "deficiencies" in retained EU law arising from Brexit (clause 7), to prevent or remedy a breach in the UK's international obligations arising from Brexit (clause 8) and to implement the withdrawal agreement (clause 9). For an in-depth analysis of the Bill, see our previous briefing entitled [Brexit: European Union \(Withdrawal\) Bill Published](#) (14 July 2017).

It is the sweeping – so called Henry VIII – powers granted to Ministers that grabbed many of the headlines surrounding the Bill, and it is restrictions on, or Parliamentary oversight of, those powers which fill many of the over 170 pages of amendments filed so far.

## Parliamentary scrutiny

In our September briefing we explained that an important focus of the first batch of amendments was increased Parliamentary scrutiny over the wide powers conferred on Ministers to make secondary legislation in the form of Statutory Instruments (SIs). As currently drafted, the majority of SIs made under the powers conferred by the Bill would not automatically receive a debate or a vote in either House. The amendments of particular interest in this area are those supported by Conservatives, particularly Amendment 3, proposed by Dominic Grieve QC MP, the former Attorney-General, which sets out a "triage" system under which Parliament has the ability to impose higher levels of scrutiny on certain SIs via the affirmative resolution procedure. Since it was initially filed, Amendment 3 has gained the express support of 15 Conservative MPs (plus many from the opposition parties) meaning that it is likely to be a key amendment so far as the Government is concerned.

In the new batch of amendments, several MPs have proposed bringing a greater proportion of secondary legislation made under the Bill within the scope of the affirmative resolution procedure, including SIs relating to the rights of workers (Amendment 235 and 237, Ian Blackford MP, SNP), the rights of disabled people (Amendment 236, Ian Blackford MP, SNP) and regulations which appoint exit day under the Bill (Amendment 293, Mary Creagh MP, Labour).

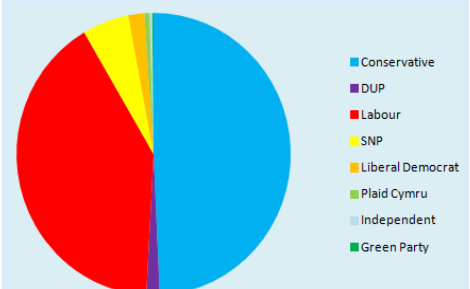
### MPs in House of Commons by party (of 650 total)

Conservative	316
Labour	261
Scottish National Party (SNP)	35
Liberal Democrat	12
Democratic Unionist Party (DUP)	10
Sinn Féin*	7
Plaid Cymru	4
Independent	3
Green Party	1
Speaker	1

Government working majority calculated as (including DUP): 13

\*Sinn Féin MPs traditionally do not take their seats in Westminster.

The chart below shows the composition of the House of Commons (based on MPs who vote in practice).



Amendment 277 from Chris Leslie MP (Labour) seeks to prevent Ministers from using clause 7 powers to correct "deficiencies" in retained EU law unless Ministers set out to Parliament how regulation-making powers transferred from EU entities to UK public bodies will receive the same level of scrutiny from the UK Parliament as they would have had from the European Parliament prior to withdrawal.

### **Public consultation**

In our September briefing, we explained the importance of public consultation on any secondary legislation made under the Bill. It remains a key concern for the business community that there should be sufficient opportunity to consider any proposed secondary legislation before it is enacted in order, for example, to spot issues that may not have been apparent to Government. The Government has remained silent on its plans (if any) to consult on the use of the powers under the Bill. Few amendments in the new batch address this issue, although Labour's Stephen Timms MP has proposed an amendment (number 155) that aims to place limits on the procedure which allows Ministers to circumvent the affirmative resolution procedure "by reason of urgency". This amendment would prevent Ministers from using the urgent procedure unless they have "satisfied themselves" that they have "sufficiently consulted" businesses and organisations likely to be affected by the measure.

### **Statutory sclerosis**

It is also likely a key concern for business that, after Brexit, the UK will be able to adapt the body of retained EU law to address changing circumstances and future changes in policy (not simply to address the deficiencies resulting from the UK withdrawal from the EU). After exit day, it could require an Act of Parliament to make any change to a vast number of the EU regulations and existing SIs implementing EU directives which will be carried over into UK law under the Bill, however technical their subject-matter and even if the powers to make rules in that area would normally be given to the Government or to a statutory regulator.

The principal issue in this area is the risk that UK law will enter a form of statutory sclerosis. It is doubtful whether Parliament has the legislative capacity to deal with the potentially huge amount of primary legislation that will be required to keep the body of retained EU law up to date in its current form. This could lead to UK law becoming fixed and unable to be updated, for example, to conform to changing international standards, to maintain equivalence with the corresponding EU legislation, or because of changes in approach that would not normally require an Act of Parliament.

The Bill provides some limited flexibility to allow the adaptation of retained EU law to changing circumstances without an Act of Parliament. In particular, Government ministers or UK regulators should be able to amend retained EU law where the retained EU law is contained in statutory instruments or regulatory rules adopted under existing powers granted by an Act of Parliament other than the ECA. The same should be true of EU regulations, decisions or delegated or implementing acts that (but for the EU's involvement) would have fallen within the scope of existing powers to adopt statutory instruments or make rules (paragraph 3 of Schedule 8 to the Bill – though one amendment proposes to delete this provision). For example, the Prudential Regulation Authority and the Financial Conduct Authority would likely be able to adapt their existing rules to changing circumstances even where those rules implement or refer to EU law. They could also amend, even replace, some of the EU regulations which pass into UK law in so far as those

regulations fall within the scope of their existing rule-making powers. In addition, the Government could use the powers under clause 7 to give a UK authority the powers granted by EU regulations (but not EU directives) to the European Commission to make or amend "Level 2" delegated or implementing acts under that legislation, although these powers are usually relatively narrow in scope.

In early October, Conservative MP Dominic Grieve QC filed NC55, which would require an Act of Parliament to change any retained EU law, thus removing any flexibility from the Bill. However, the amendment also requires Ministers to establish a list of "technical provisions of retained EU law" that may be amended by subordinate legislation, subject to some additional safeguards, including public consultation, without any time limit.

A similar Labour-sponsored amendment was cited in our September briefing (NC25, Kerry McCarthy MP, Labour), but Mr Grieve's proposal seems more likely to gain traction since it has attracted support from the Conservative benches. The proposal could provide some flexibility for the future, always assuming that the Government is able to identify which parts of retained EU law qualify as "technical provisions" within the scope of these powers. The amendment allows the Government to use delegated powers to amend these "technical" provisions for any purpose, not merely to cure deficiencies arising from Brexit. But exit from the EU is still likely to require a lot of new UK legislation in a large number of the non-technical areas on which the EU currently legislates in order to establish an appropriate balance of powers between Parliament and the executive (and independent regulators) and to address new developments.

### **Limits on Government's delegated powers under the Bill**

The theme of restricting the Government's ability to use its sweeping powers under the Bill continued into October. New amendments were proposed to prevent clause 7 powers being used to remove consumer rights (Amendment 222, Ian Blackford MP, SNP) or to make any provision which is not compliant with the UN Convention on the Rights of the Child (Amendment 149, Kate Green MP, Labour) or to prevent clause 9 powers from being used unless Parliament has approved a strategy for maintaining the protections and other arrangements which will lapse as a result of the UK's withdrawal from Euratom (Amendment 300, Edward Vaizey MP, Conservative).

Several amendments have been filed in October to restrict Ministers' ability to make secondary legislation to circumstances when they consider it "necessary" rather than the current wider standard of when they consider it "appropriate" (see Amendments 205-210 and 212-215, Ian Blackford MP, SNP and also the previously filed Amendment 65, Chris Leslie MP, Labour). Narrowing the wide scope of Ministers' discretion under the Bill is unlikely to be acceptable to Government as this could make Government actions more susceptible to successful challenges under judicial review proceedings.

A key amendment in this area remains the previously filed Amendment 1 (Dominic Grieve QC MP, Conservative), which limits Ministers' clause 7 powers to correct "deficiencies" to a specified (but fairly wide) list e.g. where a provision in retained EU law has no practical application or where EU references are "no longer appropriate". Amendment 1 has attracted the support of many MPs, including 13 Conservatives.

## Retaining principles of EU law

We previously highlighted the amendments proposed by MPs to continue the application of certain provisions of EU law which are expressly excluded by the Bill, such as the EU Charter of Fundamental Rights and the *Francovich* principle, which provides that individuals can obtain damages in national courts if a state fails to implement EU law properly. Conservative-sponsored Amendments 8, 9 and 10 (see box to the right) have all gained the support of a significant number of MPs, including several Conservatives.

Labour has also reiterated its commitment to "entrench the EU Charter of Fundamental Rights" and has filed Amendment 335 (Jeremy Corbyn MP, Labour), which provides that the *Francovich* principle would continue to apply for breaches that took place before exit day and also throughout a transition period. Further amendments filed in this area include Amendment 306 (Jeremy Corbyn MP) which would require UK courts to take account of rulings of the Court of Justice of the EU in relation to employment, equality and health and safety rights and protections and NC60 (Mary Creagh MP, Labour), which aims to retain principles of EU environmental law.

## Transition

In her Florence speech on 22 September 2017, Prime Minister Theresa May confirmed that the Government would seek to agree with the EU a time-limited "implementation period" of "around two years". In early October, Conservative MP Kenneth Clarke proposed NC54, which would prevent Ministers using their powers under the Bill to appoint an "exit day" unless the Florence speech objectives, including access to EU and UK markets on current terms during the transition period, feature in the Withdrawal Agreement.

Several provisions in the Bill, including the core provision which repeals the ECA, are triggered on "exit day", a date determined by Ministers (indeed, they can in theory set more than one exit day). While the Government would presumably fix exit day for the beginning of 30 March 2019, exit day does not strictly need to coincide with the date on which the UK actually ceases to be a member of the EU. Shifting the exit day beyond March 2019 could delay certain provisions of the Bill, including the repeal of the ECA. Some previously filed amendments, e.g. Labour-sponsored Amendment 43 (Jeremy Corbyn MP) and NC4 (Chris Leslie MP), seek to hand the power to determine exit day to Parliament. This could enable Parliament to defer exit day until after a transition period; although any arrangements for e.g. market access during that period would need to be negotiated with the EU by the UK Government. These powers could also enable Parliament to delay certain provisions of the Bill coming into effect if Parliament is unhappy with either the content of the Withdrawal Agreement or if there isn't an Agreement at all, i.e. a "no deal" scenario.

As we discuss below, it is difficult to see how Parliamentary powers of this sort would work in practice. For example, if there is "no deal" the UK would still leave the EU by virtue of Article 50, and it could be counterproductive for Parliament to prevent the Government from fixing problematic or nonsensical provisions in retained EU law.

In the new batch of amendments, the Labour front bench team has proposed restricting the designation of exit day under various clauses to ensure certain provisions of the Bill do not come into effect until after a transition period (see box on the right).

### Retaining Principles of EU law amendments (filed in September)

- Amendment 8 (Dominic Grieve QC MP, Conservative) – Continues the application of the Charter of Fundamental Rights.
- Amendment 9 (Dominic Grieve QC MP, Conservative) – Continues the application of the *Francovich* principle.
- Amendments 9 and 10 (Dominic Grieve QC MP, Conservative) – Removes restriction on bringing challenges to retained EU law on grounds that it breaches general principles of EU law.

### Key Labour amendments on transition proposed in October

- Amendment 278 – The restriction in clause 6 which prevents UK courts from being bound by CJEU decisions and referring cases to the CJEU would only operate after a transition period.
- Amendment 286 – Retention of the principle of the supremacy of EU law for UK legislation passed or made during a transition period.
- Amendment 335 – The *Francovich* principle shall continue to apply during transition.
- Amendment 336 – A general principle of EU law that is recognised as such during transition would remain part of UK law.

## **A vote on the Withdrawal Agreement**

Whilst the Government has promised a "meaningful vote" on the Withdrawal Agreement, it is so far unclear exactly what is meant by this assurance. There is support on the Conservative and opposition benches to amend the Bill to ensure Parliamentary oversight on the terms of the Withdrawal Agreement. Amendment 7 (Dominic Grieve QC MP), which was highlighted in our September briefing, prevents Ministers from exercising their powers under the Bill to implement the Withdrawal Agreement unless Parliament has passed a statute approving the final terms of withdrawal. This proposal has continued to gain support from MPs from across the parties, including ten Conservatives who are said, by one of their number, Nicky Morgan MP, to be "deadly serious" in supporting it. A binding Parliamentary vote on the terms of the Withdrawal Agreement is also one of Labour's key demands for the Bill and forms the basis for Labour's recently-filed NC66 (Jeremy Corbyn MP), which also prevents exit day being appointed under the Bill if there is no Withdrawal Agreement, and NC68 (Geraint Davies MP), which requires that the approval of both Houses be sought no later than three months before exit day.

However, a Parliamentary vote to reject - or the failure by Parliament to approve - a Withdrawal Agreement negotiated by the EU and UK would not itself stop the Article 50 withdrawal process. Even in the absence of a Withdrawal Agreement, the UK will cease to be a Member State of the EU when the clock strikes midnight on 29 March 2019 - unless the UK's Article 50 notice is withdrawn (the legal possibility of which is debatable) or the two year period in Article 50 is extended (which would require unanimous agreement by other Member States). Parliament might not like the Withdrawal Agreement but, unless the EU is prepared to agree amendments, Parliament's only option will in practice be to take it or leave it. Whether the EU would agree, or could in practice agree, last minute amendments to a Withdrawal Agreement to satisfy politicians in Westminster is questionable.

It is also worth remembering that the Government will likely need to comply with the requirements of Part 2 of the Constitutional Reform and Governance Act 2010. This Act provides that the Government must lay a treaty it proposes to ratify before both Houses of Parliament and may not ratify that treaty until a period of 21 sitting days has passed without an objecting resolution being passed by either House. Whilst both Houses have the power to pass resolutions that the treaty not be ratified, only the House of Commons has the power to block ratification by continuing to pass such resolutions (although it has never yet done so). The Act does not, however, require either House to debate or vote on treaties.

The Government has confirmed that it believes the 2010 Act procedure "is very likely to apply" to any deal negotiated with the EU, and in *R (oao Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [211], some members of the Supreme Court also indicated that the procedure is likely to apply. Therefore, in addition to any right to a vote promised by the Government or obtained via amendment, the 2010 Act's requirements for Parliamentary scrutiny would need to be met prior to any Withdrawal Agreement entering into force.

## **Devolution**

The Bill has caused controversy in relation to the devolution settlement as it limits the role of devolved authorities in adapting retained EU law (for more detail see our briefing entitled [Brexit: European Union \(Withdrawal Bill\) and the Devolution Dimension](#) (21 July 2017)).



Around a third of the amendments proposed in October relate to devolution. The Scottish and Welsh Governments jointly published 38 amendments in mid-September, which were then filed by Westminster MPs from the SNP and Labour in the following month. For example, Amendment 164 (Ian Murray MP, Labour), removes the provisions from the Bill which restrict the Scottish and Welsh legislatures from modifying retained EU law (a similar amendment had already been filed by Labour's front bench team - Amendment 42 - which also removed restrictions on Northern Ireland's Assembly).

With its narrow working majority, the Government whips will be counting votes carefully. The support of the sizeable contingent of 35 SNP MPs, who are supporting many of the devolution-related amendments, could be very useful in securing the passage of the Bill through the Commons. Labour, which leads a minority administration in Wales (and continues to vie for Welsh votes with the nationalist Plaid Cymru), is unlikely to support the Bill unless there are concessions on the devolution front. Indeed, many devolution-related amendments have support from Labour MPs from around the UK, and ensuring "powers returning from Brussels go to Cardiff, Edinburgh and Belfast" is one of Labour's key demands for the Bill.

Even if the Bill can pass both Houses of Parliament with its current devolution provisions intact, the political headache does not end there. The Government proposes to seek legislative consent from the devolved administrations for the main provisions of the Bill. A Scottish Minister confirmed in mid-October that the Scottish Government remained unable to recommend that the Scottish Parliament consent to the Bill "until the power-grab is removed". Whilst a refusal to grant consent would not present a legal impediment to the passage of the Bill into law, the political consequences of pressing on without the devolved authorities' stamp of approval could be grave, particularly amid the lingering concerns over a potential second independence referendum in Scotland.

It seems that if (and likely when) the Government gives ground on some of the proposed changes to the Bill, the political expediency of making devolution-related concessions may send some of these amendments towards the head of the queue.

## Conclusion

October has seen more of the same. The myriad of new amendments filed generally follow the same themes as those proposed before the conference recess, though with a few new ideas thrown into the mix. What has been interesting is a coalescing of support, both on the pages of the amendment papers and in media reports, around amendments proposed by Conservative MPs, particularly those from former Attorney-General Dominic Grieve QC. As the delays on debate of the Bill indicate, it seems less and less likely that the Government will be able to get the Bill through its Committee Stage unamended, and we will likely see changes on provisions relating to parliamentary scrutiny and possibly also devolution. With its ongoing negotiations in Europe, the Government is currently fighting fires both at home and abroad whilst meanwhile not forgetting another potential domestic battleground over this Bill ahead: the House of Lords.

### Other amendments filed by Dominic Grieve QC MP (Conservative)

- Amendments 2, 12 and 13 – Restrict the circumstances in which powers under clauses 7, 8 and 9 may be used to where Ministers consider that certain conditions are met e.g. the provision does not remove any necessary protection.
- Amendment 5 – Prevents the abolition (as opposed to replacement or modification) by SI of a function carried out by an EU entity in the UK.
- Amendment 6 – Exit day must be the same day for every provision within the Bill.
- Amendment 11 – Removes the proposal to allow secondary legislation to be treated as primary for the purposes of the Human Rights Act 1998.
- Amendment 15 – Removes clause 7 power to remedy other deficiencies in retained EU law beyond the failure to operate effectively.
- Amendment 16 – Removes provision from clause 7 which provides that the meaning of deficiency can cover a deficiency that arises out of withdrawal taken together with operation of or interaction between provisions of, or made under, the Bill.
- Amendments 297, 298, 299 – Remove references to the rule of law in clause 5.

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