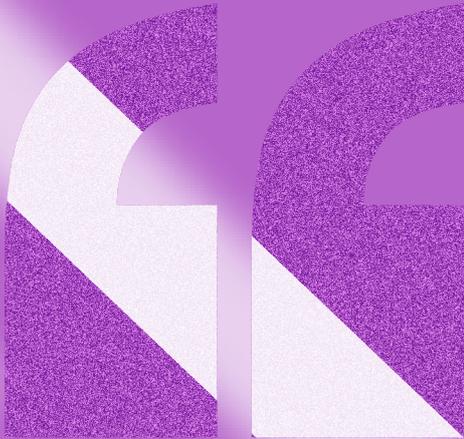


C L I F F O R D

C H A N C E



THE EUROPEAN UNION (WITHDRAWAL) ACT 2018: WHAT IT DOES, WHY AND HOW



– THOUGHT LEADERSHIP

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THE EUROPEAN UNION (WITHDRAWAL) ACT 2018: WHAT IT DOES, WHY AND HOW

The European Union (Withdrawal) Act 2018 has finally passed all its Parliamentary stages, received Royal Assent, and become law. It will keep most existing EU law as UK domestic law after Brexit in order to ensure the continuity and completeness of the UK's legal system. It will also confer wide powers on the Government to amend that retained EU law in order to remedy or mitigate any deficiencies arising from the UK's withdrawal from the EU. Identifying deficiencies and then deciding how to address them is where the real work starts.

Key issues

- The EU(W)A 2018 has been enacted largely intact as to its substantive aims
- The Act continues EU law as part of UK law, giving the Government power to remedy problems in that law arising from the UK's withdrawal from the EU
- This remedial work will require around 800 legislative instruments, plus further regulatory changes
- Ensuring that this work is done effectively is key for business
- The Act makes subsequently keeping this retained EU law up to date harder than need be
- Politics is never far from the surface of the Act

A couple of weeks shy of a year since it was first introduced into Parliament as a bill, the European Union (Withdrawal) Act 2018 finally passed into UK law. The passage of the Act through Parliament generated much political heat and drama, though rather less illumination. Despite all the last-minute deals to buy off rebels, claims of betrayal as deals unravelled, new deals conjured up in smoke-free rooms, late night votes and so on, the Act is, so far as its substantive aims are concerned, not very different from the bill the Government introduced into Parliament a year earlier. This is not to say that no changes have been made to the bill – the page count alone has increased by two-thirds – but the changes do not in the main affect the core function of the legislation. The Government's Parliamentary weakness has forced it to cede to Parliament a greater role in the Brexit process than the Government wanted, but that plays to the politics of Brexit rather than the heart of the Act.

The Act is a critical piece of technical legislation designed to ensure that the UK's legal system will continue to function properly after the UK has withdrawn from the EU. Whatever the wisdom or otherwise of the UK's withdrawal from the EU, it is essential that the UK's legal system remains effective and complete following Brexit. The issues are not with English transactional law (contract law, trusts etc), which remains largely untouched by the EU, but with regulatory and related structures. Some of the amendments proposed in Parliament – whether in the name of Parliamentary sovereignty or with the (unstated) hope of kyboshing Brexit – risked jeopardising the ability to make sure that this UK law will

continue to work. But ultimately the Government's will has prevailed in Parliament, at least so far as those proposals are concerned.

The Act does three principal things:

- It will repeal the European Communities Act 1972 (the ECA) on exit day, bringing an end to the overriding role of EU law in the UK's legal system (section 1). This is a matter of totemic significance as well as legal impact.
- It will reimport (or "onshore") into UK domestic law as "retained EU law" most of the EU law that applies in the UK immediately before exit day (sections 2 to 6).
- It gives the Government wide powers to amend this retained EU law in order to correct deficiencies in that law arising from the UK's withdrawal from the EU (section 8).

This last task is where the work now lies. The Government has said that "around 800 pieces of secondary legislation will be needed" to correct deficiencies in the retained EU law. The financial regulators will also be making extensive changes to EU technical standards and to their rulebooks. This process will involve policy choices and technical details. Everyone must both keep watch on what the Government and regulators are doing and ensure that the changes are effective.

Why is the Act necessary?

Aside from symbolism, the repeal of the ECA will have serious legal consequences. Much of the EU law that now applies in the UK does so because of the ECA. Directly applicable EU law

(largely EU regulations) applies in the UK because section 2(1) of the ECA provides for its application; and much EU law that required local implementation by member states (largely EU directives) was implemented in the UK by statutory instruments made under section 2(2) of the ECA. The Act's repeal of the ECA would mean that all EU law given effect by the ECA would fall away.

In an ideal world, and to align with UK constitutional norms, taking back control of UK law from the EU would result in Parliament looking in detail at all the EU law applicable in the UK, re-enacting those parts it favours, modifying other laws, scrapping what it dislikes, and passing wholly new laws where appropriate. None of this is, however, remotely feasible. As a body set up in no small part to replace war with law, the EU has legislated extensively in its 60+ years of existence – some 7000 substantive EU laws are reportedly now in force in the UK. Parliament simply does not have the capacity to address all these laws before Brexit (or, indeed, for a long time after Brexit).

EU law is not, in the main, of a take it or leave it variety. It covers areas where, even if the UK had never been a member of the EU, the UK would have (and often had) legislated for itself – environmental standards, bank capital requirements, consumer protection and employment rights to name but a few. Given the inability of Parliament to revisit and revise all these laws before Brexit, there is no option but to keep most of the EU law that applies immediately before Brexit. This will ensure that the UK's stock of laws does not contain unfortunate gaps, but it will also ensure continuity in substantive law despite the change in the underlying legal infrastructure. The Government is signalling that there will be no immediate "bonfire of regulation" that might undermine the UK's negotiations with the EU.

But bringing this retained EU law into UK domestic law without more will create its own problems after Brexit. Some EU law will continue to operate effectively – for example, where it lays down a self-contained rule as to the law applicable to contracts, water quality or consumer

rights. But much EU law gives powers to EU institutions, involves reciprocity between EU member states or is otherwise only effective within the overall edifice of the EU. These laws must be adapted to the fact that the UK will no longer be a member of the EU.

Again, in an ideal world this adaptation would be done by Parliament. But it is beyond Parliament's capacity even to deal individually with the detail of the 800 or so instruments that will be required to cure the deficiencies in retained EU law. So the Act gives the Government the power to make these amendments to retained EU law (subject to a degree of Parliamentary scrutiny, described below). This brings about a perhaps unprecedented transfer of legislative power to the Government. Again, there was in practice no choice.

What is retained EU law?

The "retained EU law" that is onshored by the Act is wide-ranging. It covers "EU-derived domestic legislation", which includes statutory instruments made under section 2(2) of the ECA to implement EU directives but also extends to "any enactment so far as... relating otherwise to the EU or the EEA" (section 2(2)(d) of the Act). It therefore includes primary legislation passed to implement EU law, as well as implementing rules made by regulators under their statutory powers. There was no legal need for the Act to give continuing effect to primary legislation implementing EU law, but there is a need for the Act to authorise changes to that legislation in order to cope with the consequences of Brexit, as described below.

Retained EU law also includes "direct EU legislation", which is any EU regulation, EU decision or EU tertiary legislation that is both in force and applies immediately before exit day (section 3). Legislation that is "in flight but not in effect" on exit day will not form part of retained EU law. The Government or the regulators may have to use their powers under the Act to address any resulting gaps that might appear, in particular where EU legislation applies in stages, with some provisions taking effect before exit day but some not doing so until afterwards.



“Exit day” will be 11pm on 29 March 2019 (section 20(1)), which is when the UK’s notice under Article 50 of the Treaty on European Union expires. The Government can change the exit day if the UK is to leave the EU on a different date, eg if the EU and the UK agree to extend the negotiations under Article 50 (sections 20(2) to (5)).





“Retained EU law” means anything which, on or after exit day, continues to be, or forms part of, domestic law by virtue of sections 2, 3 or 4 or subsection (3) or (6) above (as that body of law is added to or otherwise modified by or under this Act or by other domestic law from time to time).



Section 6(7) of the European Union (Withdrawal) Act 2018

The validity, meaning and effect of retained EU law is to be interpreted in accordance with, amongst other matters, “retained EU case law” (section 6(3)). Retained EU case law means “principles laid down by, and any decisions of, the European Court [ie the CJEU], as they have effect in EU law immediately before exit day”. Only the Supreme Court is exempted from this obligation placed on UK courts to apply pre-Brexit CJEU decisions to retained EU law. The Supreme Court can depart from a decision of the CJEU in the same way that it can depart from its own earlier case law (section 6(4)).

UK courts are not bound by decisions of the European Court made after exit day, but “may have regard” to those decisions “so far as relevant to any matter before the court” (sections 6(1) and (2)). However, if the CJEU were to decide that a piece of EU legislation made prior to Brexit is invalid, the equivalent retained EU law would remain valid in the UK (paragraph 1(1) of Schedule 1).

Retained EU law does not include the EU’s Charter of Fundamental Rights (section 5(3)). Nor does it include any right to damages in accordance with “the rule in Francovich” (paragraph 4 of Schedule 1). Francovich allows people to claim damages from a member state in certain circumstances if that member state has wrongly implemented or failed to implement an EU directive or otherwise acted in breach of EU law. The UK has faced (and continues to face) numerous actions for enacting tax law in breach of EU law principles, requiring it to refund significant amounts. There will be no right in domestic law on or after exit day to damages in accordance with the rule in Francovich.

What changes can be made to retained EU law?

The Act gives the Government wide powers to change retained EU law. These powers can be used for up to two years after exit day (section 8(8)), but the powers are not absolute. The Government can only use the powers in the Act to amend or repeal retained EU law

- if the Government considers that there is a failure of retained EU law to operate effectively or that there is another deficiency in retained EU law (sometimes called “inoperables”), and
- that failure or other deficiency arises from the UK’s withdrawal from the EU (section 8(1)).

The Government cannot, for example, change employees’ rights just because it considers that the EU tipped the balance too far in one direction or the other: it must first point to a deficiency in retained EU law arising from Brexit. Nor is retained EU law deficient merely because it does not include a change made by the EU to that law after Brexit (section 8(4)).

Section 8(2) of the Act sets out what constitutes a deficiency in retained EU law (though the categories are capable of being expanded under section 8(3)(b)). These include anything which is of no practical application or is otherwise redundant, which confers functions on EU entities or which contains EU references that are no longer appropriate.

As significantly, a deficiency also includes reciprocal arrangements between the UK and the EU or its member states that the Government considers are no longer appropriate after exit day (sections 8(2)(c) and (e)). Much EU legislation requires reciprocal recognition of judgments, licences, certifications, qualifications and other matters granted in EU member states or by the EU itself. HM Treasury has said that the “general principle” will be that the UK would “default to treating EU Member States largely as it does other third countries”, ie the UK will not unilaterally continue to recognise these matters coming from the EU. The Treasury recognises that there will be exceptions to this general principle, such as the temporary permissions regime announced in December 2017 to allow EEA financial services firms to continue operating in the UK after the loss of their passporting rights on Brexit, though only for a time-limited period.

If there is a failure of retained EU law to operate effectively or any other deficiency arising from Brexit, the Government can

make “such provision as [it] considers appropriate to prevent, remedy or mitigate” that deficiency. This confers considerable latitude on the Government. The changes required will not just be technical corrections but will involve policy choices and other complexities (for example, even changing sums expressed in euros to sterling can raise significant issues). The Government can, for example, provide for the functions of EU entities or public authorities (including making instruments “of a legislative character”) to be exercisable by UK public authorities (section 8(6)).

The Act cannot, however, be used to create public authorities, to impose or increase taxation, or to make retrospective provision (section 8(7)).

The powers are supported by additional powers to make consequential and transitional provisions (section 23).

The Government has offered some examples of the measures it anticipates taking under section 8. One example relates to financial services. EU financial services legislation (eg the CRR, AIFMD, EMIR and MiFID2/MiFIR, to identify but a few acronyms) confers on the European Commission many powers to adopt “binding technical standards” to implement the legislation, based on drafts proposed by the European Supervisory Authorities. HM Treasury has published a draft statutory instrument (the Financial Regulators’ Powers (Technical Standards) (Amendments etc) (EU Exit) Regulations 2018), to be made under section 8 of the Act, which will delegate to the PRA, the FCA, the Bank of England and the Payment Services Regulator the power to make “EU exit instruments” remedying deficiencies arising from Brexit in these technical standards. The regulators will also be able to use these instruments to remedy deficiencies in the EU-derived provisions of their own rules without the need to comply with the consultation and other requirements that normally apply to rule changes.

HM Treasury also proposes that the measures it adopts to remedy deficiencies in EU financial sector

legislation will give the UK regulators the ongoing power to make binding technical standards in place the European Commission. The draft statutory instrument adds new sections to the Financial Services and Markets Act 2000 (FSMA) and the Financial Services (Banking Reform) Act 2013 creating a framework for the regulators to make “standards instruments” for this purpose, though only after following the consultation and other procedures that apply to their normal rule-making processes. However, unlike the normal rule-making processes, the regulators will not be able to make EU exit instruments or standards instruments without the approval of HM Treasury. The Treasury will be able to veto EU exit instruments if they don’t comply with the requirements of the Act. It will also be able to veto standards instruments if it considers that they have implications for public funds or might prejudice the UK’s international negotiations.

The Act does not preserve as retained EU law any guidelines, recommendations, FAQs or other non-binding pre-Brexit “level 3” pronouncements by the European Commission or the European Supervisory Authorities. Given their non-binding nature, to do so is unnecessary. All that might be needed is a statement from each UK regulator that it will treat those EU pronouncements with the same respect (or otherwise) that it did before Brexit.

Parliamentary control of subordinate legislation

Subordinate, or secondary, legislation of the sort contemplated by section 8 of the Act can, in general, be made in one of two ways: with the positive approval of both Houses of Parliament; or in the absence of Parliament’s express disapproval. Schedule 7 to the Act sets out when the Government must adopt the affirmative procedure and when it can adopt the negative procedure. For example, if a statutory instrument to be made under section 8(1) provides for any function of an EU entity “of making an instrument of a legislative character to be exercised instead by a public authority in the United Kingdom”, that

The timing of changes to retained EU law

The Act is predicated on a hard Brexit occurring on “exit day”. Retained EU law becomes UK domestic law on exit day, and the changes necessary to correct deficiencies in retained EU law need to be ready for that day.

But there could be a transition period (or implementation phase) in a withdrawal agreement between the UK and the EU (assuming that the obstacles to an agreement can be overcome). The current draft of the withdrawal agreement requires the UK to continue to apply EU law until 31 December 2020, in substance (though not form) postponing Brexit for 21 months.

The Act does not address directly the possibility of a transition period. Section 9 allows the Government to make provisions for the implementation of the withdrawal agreement if that is necessary before exit day and subject to the prior enactment of legislation approving the withdrawal agreement. This could be used to provide for the continued application of EU law after exit day, coupled with a delay in the coming into force under section 8 of measures to correct deficiencies in EU law arising from the UK’s withdrawal from the EU. The transitional powers in section 23 could also be used.

If a withdrawal agreement is reached, the new legislation required by section 9 must contain provision for the implementation of the withdrawal agreement (section 13(1)(d)), which will presumably provide for the continued application of EU law until the end of 2020 and amend the Act in order to assist in this (eg by extending the two-year limit in section 8(8) on the use of the corrective powers in section 8).



A Minister of the Crown may by regulations 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.



Section 8(1) of the European Union (Withdrawal) Act 2018

statutory instrument must be approved by a resolution of each House of Parliament (paragraphs 1(1) and (2) of Schedule 7). This affirmative procedure can, however, be avoided in the case of urgency (paragraph 5).

Even where there is no express requirement for an affirmative resolution of each House of Parliament, if the Government wishes to use the negative procedure, it must explain why and then allow the sifting committees in the Houses of Commons and Lords ten sitting days in which to make a recommendation as to the appropriate procedure (paragraph 3 of Schedule 7, subject again to urgency). If the Government does not agree with a recommendation to use the affirmative procedure, it can still use the negative procedure but must explain why it does not agree with the committees' recommendation (paragraphs 3(6) to (9) of Schedule 7), which could have political consequences.

The use of prior powers to change retained EU law

Existing UK legislation contains numerous rule-making and similar powers (such as the FSA's and PRA's powers under sections 137A and 137G of FSMA). Those powers are currently constrained by the UK's membership of the EU because they cannot be exercised in a manner that is inconsistent with EU law. In particular, if directly applicable EU law covers a particular area, those powers will have gone into abeyance. The UK's withdrawal from the EU would, prima facie, resuscitate those powers. However, section 7 and Schedule 8 of the Act potentially prevent this resuscitation by setting out complex provisions on the status of particular kinds of retained EU law and on what prior powers can be used to change those kinds of retained EU law.

Section 7 is concerned with "retained direct principal EU legislation" and "retained direct minor EU legislation". Retained direct principal EU legislation is any EU regulation that is converted into retained EU law, provided that it was not "EU tertiary legislation", ie rules made

pursuant to an EU regulation or directive. Retained direct minor EU legislation is any other kind of retained direct EU legislation imported into UK law by section 3 of the Act.

Section 7 treats retained direct principal EU legislation as if it were UK primary legislation. As a result, it can, in summary, only be amended by a subsequent Act of Parliament, by secondary legislation made under the Act itself or under a so-called "Henry VIII" power in prior primary legislation, or by secondary legislation if the amendment is "supplementary, incidental or consequential in connection with any modification of retained direct minor EU legislation" (section 7(2)). A Henry VIII power is a power granted by primary legislation that expressly allows secondary legislation to modify primary legislation (the power in section 8 of the Act is itself a Henry VIII power).

Retained direct minor EU legislation is treated as if it were UK secondary legislation. It can, in summary, be amended by a subsequent Act of Parliament, by secondary legislation made under the Act or under a Henry VIII power in prior primary legislation, or by secondary legislation under powers granted by prior legislation provided that the amendment is consistent with retained direct principal EU legislation (section 7(3)).

Retained EU law and the sclerosis problem

One result of Parliament's insertion of section 7 and its additions to Schedule 8 to the Act is that it will be more difficult to update retained EU law than it would have been under the Government's original bill.

For example, Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (the CRR) will be onshored as retained direct principal EU legislation. It contains over 300 pages of highly technical provisions about, amongst other matters, capital requirement for banks and certain investment firms. In domestic terms, this kind of detailed legislation would be

included in rules made by the PRA or FCA under FSMA, where they could then be updated in accordance with the procedures required by FSMA (which include, for example, consultation obligations and cost-benefit analyses). However, the effect of the Act is that the onshored CRR is treated as if it were an Act of Parliament, which can only be updated (after the initial modifications under section 8) by primary legislation – the relevant rule-making provisions in FSMA are not Henry VIII powers. Given Parliament’s limited capacity to pass primary legislation (it has passed an average of about 31 pieces of primary legislation a year over the last decade), this could make updating the onshored CRR difficult, leaving UK law in a state of sclerosis when others have moved on.

This potential sclerosis problem is not confined to retained direct principal EU legislation. Statutory instruments made under section 2(2) of the ECA (“EU-derived domestic legislation”) will continue to apply after Brexit despite the repeal of the ECA (section 2 of the Act). But no matter how detailed, how technical or how out-dated these statutory instruments may be or become, there is no general means to amend these instruments. If they fall within the scope of a prior rule-making power, that rule-making can be used. But if there is no prior rule-making power, primary legislation – an Act of Parliament – will be required, with the potential capacity problems within Parliament and the delays that this might cause.

The hope must be that Parliament will find time to allocate EU-derived technical legislation to the right level within the UK’s legislative hierarchy.

Devolution

The Act contains lengthy provisions about devolution, which have generated political fury in Scotland. The core battle between the UK and the Scottish Governments has been about which should get the powers that will be repatriated from the EU on Brexit. For example, agriculture in general falls within Scotland’s devolved powers. As part of the UK, Scotland’s ability to exercise of those powers is subject to overriding EU rules, which limit significantly what Scotland can do. The

Act provides, initially at least, for the bulk of repatriated EU powers to come to the UK Government in order to maintain the UK’s single market. The Scottish Government sees this as a power grab by Whitehall, depriving Scotland of existing devolved powers. The UK Government’s response is that Scotland has never had power over the relevant areas because they fall within the EU’s jurisdiction. (Wales originally sided with Scotland, but its administration reached a settlement with the UK Government.)

The Scottish Parliament and Government were established by UK legislation (the Scotland Act 1998), and the terms of devolution can similarly be amended by further UK legislation. However, the Sewel Convention, now embodied in section 28(8) of the Scotland Act 1998, provides that the UK Parliament will not “normally” legislate on devolved matters without the Scottish Parliament’s consent. The European Union (Withdrawal) Act 2018 does affect devolved matters, and the Scottish Parliament refused its consent to the Act. The UK Government and the UK Parliament went ahead with the Act regardless. In *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the Supreme Court decided that the Sewel Convention is a political declaration that does not place any legal fetter on the UK Parliament’s ability to legislate for Scotland. The Act does so, and is as binding in Scotland as it is in England, Wales and Northern Ireland.

The Supreme Court will revisit the competence of the Scottish Parliament on 24 July 2018. Not content to leave the substance of the Act to Westminster, in March 2018 the Scottish Parliament passed the UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. This is modelled on the (then version of) the Act, but keeps in Scotland the powers that the Scottish Government considers that Scotland ought to have. The Supreme Court will have to decide whether the Bill is within the powers of the Scottish Parliament (the Presiding Officer of the Scottish Parliament concluded that certain aspects of the Bill were outside the Scottish Parliament’s powers).



(1)... the [Scottish] Parliament may make laws, to be known as Acts of the Scottish Parliament....

(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland.

(8) But it is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.



Section 28 of the Scotland Act 1998



The politics of the Act: controlling withdrawal

The primary function of the Act is to bring EU law into UK domestic law and to allow that EU law to be modified to cater for the consequences of Brexit. But the prospect, or threat, of Brexit continues to excite political passions, and these passions are reflected in some of the additions to the Act made in its course through Parliament. Most involve an attempt to exert Parliamentary control over the Brexit process through a “meaningful vote”, particularly on the withdrawal agreement or the absence of a withdrawal agreement, whether in an attempt to ensure that Brexit happens, to thwart Brexit, or to find some middle way.

Section 13(1) provides that a withdrawal agreement with the EU can only be ratified if, in summary:

- the Government lays before each House of Parliament a copy of the withdrawal agreement and of the “framework for a future relationship” (ie the “political agreement... reflecting the agreement in principle on the substance of the framework for the future relationship between the EU and the United Kingdom after withdrawal”: section 13(14));
- the House of Commons approves the agreement and framework; and
- an Act has been passed which contains provision for the implementation of the withdrawal agreement.

Section 13(2) obliges the Government, so far as practicable, to ensure that the UK Parliament votes on the withdrawal agreement before the European Parliament does so. The consent of the European Parliament is required under article 50 of the Treaty on European Union before the EU can conclude the withdrawal agreement. Section 13(2) is aimed at giving the UK Parliament greater scope to reject the withdrawal agreement and send the Government back into

negotiations (assuming, of course, that the EU is prepared to talk further). If the European Parliament had already given its consent, there could be a feeling that the UK Parliament’s only options were to take it or to leave it – the UK Parliament would rather that the European Parliament was in that position.

If the House of Commons rejects the withdrawal agreement and the framework for a future relationship, the Government must make a statement within 21 days setting out how it proposes to proceed in relation to the negotiations with the EU on withdrawal, which must then be debated in Parliament on “a motion in neutral terms” (sections 13(3) to (6)).

If by 21 January 2019 there is no agreement in principle on the substance of the arrangements for UK’s withdrawal from the EU and on the framework for the future relationship, the Government is obliged within five days to make a statement to Parliament setting out how it proposes to proceed, and to make arrangements for the House of Commons to debate this statement (again on a “motion in neutral terms”).

The politics of the Act: other issues

In addition to greater Parliamentary control over the withdrawal process, the Act also requires the Government:

- to publish within six months a draft Bill dealing with environmental issues (section 16). The Bill must, for example, include a set of environmental principles and establish a public authority with the ability to take enforcement measures against the Government if the Government is not complying with environmental law;
- to make a statement in Parliament by 31 October 2018 “outlining the steps taken... to seek to negotiate an agreement... for the UK to participate in a customs arrangement with the EU” (section 18); and

- to seek to negotiate with the EU an agreement dealing with unaccompanied children in the EU who may wish to join a relative in the UK or vice versa (section 17).

The Act also addresses the border between Northern Ireland and the Republic of Ireland. Section 10(1) provides that powers under the Act (including those in section 8) must be exercised in a way that is compatible with the Northern Ireland Act 1998, which implements the Belfast (or Good Friday) Agreement, and with due regard to the UK/EU joint report on the first phase of the withdrawal negotiations. This joint report provided that “[i]n the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement”.

Section 10(2) goes on that the powers in section 8 cannot be used to create border arrangements between Northern Ireland and the Republic of Ireland which feature physical infrastructure, such as border posts. Section 10 might have some impact on the use of the powers in the Act, but the real issues over Ireland are likely to come to the fore in the primary legislation promised by the Government concerning customs and other matters.

Next steps

The politics of Brexit remain difficult, but the primary legal issue for the UK is to ensure that its statute book will be functional on exit day. This means drafting the 800 or so statutory instruments expected under section 8 of the Act. This is initially a matter for the Government, which has already published some draft examples, including the Financial Regulators’ Powers (Technical Standards) (Amendments etc) (EU Exit) Regulations

2018 mentioned above, the Employment Rights (Amendment) (EU Exit) Regulations 2018, the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018, the Seal Products (Amendments) (EU Exit) Regulations 2018 and the Design Right (Semiconductor Topographies) (Amendment) (EU Exit) Regulations 2018.

Some of these statutory instruments will be relatively straightforward. For example, the instrument dealing with applicable law ought to be simple – though the published draft omitted the more complex areas (eg insurance law) and arguably continued one area of reciprocity that is inappropriate (though this area is largely inconsequential in practice). Other instruments, notably those on financial regulation, will be more complex, involving potentially significant policy choices. Businesses affected by EU law (which is all business) will want to assess what the Government is proposing and be sure, amongst other matters, that it works in practice.

The Government’s drafting technique is likely to make reviewing the effect of the proposed statutory instruments hard. The Queen’s Printer is obliged to publish EU regulations, decisions and tertiary legislation in force on exit day (section 15 and Schedule 5 of the Act, though there is no time limit for doing so) in order to ensure that the EU law onshored by the Act is readily available. But the statutory instruments amending retained EU law will, it seems, follow the conventional form of amending instruments (see the example in the box on the following page).

Although this is the usual approach to amending legislation, the absence of an amended and restated version of the relevant EU regulation or other law (called, within Government, a “Keeling Schedule”) makes it harder to see exactly what an amendment is doing. It will therefore be



Amending retained EU law

The draft version of the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2018 provides, by way of example:

“(2) In Article 1, for paragraph 4, substitute—

“4. In this Regulation, “relevant state” means the United Kingdom and—

(a) in Article 3(4) and Article 7, all the Member States;

(b) in all other Articles, the Member States to which Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), as it applies in the European Union and as amended from time to time, applies.”

(3) In Article 2, for “Member State”, substitute “relevant state”.

(4) In Article 3(4)—

(a) for “Member States”, substitute “relevant states”...

This approach, in keeping with the usual practice of those who draft legislation, is to set out each amendment individually rather than to produce a consolidated version of the amended legislation.

for the private sector to produce more understandable versions of retained EU law and, as importantly, of the drafts of retained EU law.

Difficulties notwithstanding, reviewing the new laws will be a major and important task. With the best will in the world, the technical nature of some EU legislation is such that there is a risk that, without help, the Government will get some aspects wrong. It therefore necessary for everyone to watch closely what the Government is doing under the Act and to draw attention to problems as quickly as possible.

These statutory instruments are not even the only legislative work required. The Government has promised other primary legislation, including customs, trade, agriculture, fisheries and migration bills. In addition, the UK financial services regulators will have to issue a large volume of EU exit instruments under their delegated powers. They have said that they will consult on them in the autumn of 2018.

Conclusion

The European Union (Withdrawal) Act 2018 has taken almost a year to get through Parliament. The politics surrounding the Act proved taxing, but that may be minor in comparison with the volume and nature of the work that the Act allows and requires to be done in order to make UK law fit for a post-Brexit world. EU law does not, in the main,

affect the law used in transactions, which will remain the same after Brexit as before, but EU law is the foundation for the regulation of a large number of industries, including financial services. These industries will need to keep a close watch on the amendments the Government is proposing to retained EU law, both to understand what the amendments do and to ensure that the law will work.

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C H A N C E

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