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# Legislating for Brexit – the UK Government's EU Withdrawal Bill

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## Introduction

The Great Repeal Bill, the UK Government's draft legislation to implement in domestic law the UK's departure from the EU, has been published. In this paper, we consider whether the Bill (now known as the **European Union (Withdrawal) Bill**) is the correct way to legislate for Brexit and whether it achieves the UK Government's key overarching aim – that of maintaining legal certainty and continuity.

Our conclusion is that the broad approach being taken by the UK Government is the right one and the only realistic way to approach this enormous task in the time available. The Bill sets the foundations for creating the legal certainty and continuity that the UK Government is aiming for and that is so important to commercial parties.

However, some areas of legal uncertainty remain, particularly from a regulatory perspective. Some of these uncertainties are difficult to resolve and perhaps an inevitable consequence of legislating on this scale in such a limited timeframe. Others could and should, in our view, be corrected. Practical uncertainties also remain, in particular in relation to timing. We consider these uncertainties in more detail below.

There is of course scope for the Bill to be amended as it passes through the Parliamentary process, which means it will be some time before we have clarity on the final form of this hugely important piece of legislation. The next time the Bill will be formally scrutinised by Parliament is in September 2017. It will be important for commercial parties operating in the UK to keep a close eye on developments throughout the legislative process so that they can engage with the UK Government and regulators (and more widely) on any issues of concern and so that they can ensure they are properly prepared for doing business in the post-Brexit world. Similarly, proactive engagement remains important – identifying in advance the issues that may arise as the negotiations progress and proposing solutions (whether through industry bodies, direct Government engagement or otherwise) will help to mitigate the risks and smooth the exit process.

## The UK Government's approach

As expected, the Bill seeks to:

- repeal the European Communities Act 1972 (the Act that gives direct effect to all EU law in the UK);
- convert EU law as it stands "on exit day" into UK law and retain EU-derived domestic legislation;
- create powers for UK Government Ministers to make changes to converted (or "retained") EU law by secondary legislation, to correct "deficiencies" and to implement any withdrawal agreement; and
- bring to an end the jurisdiction of the Court of Justice of the EU in the UK.

The Bill also provides for some directly effective EU law rights to be given effect in UK law and confirms that the Charter of Fundamental Rights will no longer apply.

The UK Government's plan to incorporate EU law as it stands on exit day into the UK statute book is absolutely the right one. It significantly reduces the risk of a regulatory gap post-Brexit. It also mitigates to some extent the regulatory compliance cost to businesses operating both in the UK and the EU27 (despite the likely need to deal with new UK regulators in certain sectors and some changes to the regulatory regime, for example in areas where reciprocity falls away). Maintaining broad regulatory equivalence, at least in the short term, should also ease the negotiation of a liberal post-Brexit trading relationship between the UK and the EU27. It means that it is more likely that formal equivalence will be granted to the UK by the EU in a number of areas of direct importance to the commercial sector – eg data protection and in parts of the financial services sector. It is also the only realistic approach in the timescales available.

The same is broadly true in relation to the proposals in the Bill to confer powers on UK Government Ministers to legislate to deal with "deficiencies" in retained EU law and implement any withdrawal agreement (as well as to make "such provision" as Ministers consider appropriate consequential on the Bill becoming law). As discussed in our commentary on the UK Government's White Paper (available here), the benefit of legislating in this way is that it is much quicker than legislating via a full Parliamentary process. But that speed is inevitably at the expense of some of the scrutiny that would normally be applied. This creates risks from a policy perspective, and increases the likelihood of mistakes and unintended consequences. But the UK Government has tried to find a balance. While the powers to legislate on this basis are very broad indeed, they are time limited (the power to correct deficiencies by this process will fall away two years after exit day). They are also limited by a requirement for at least some Parliamentary scrutiny. Secondary legislation that (among other things) establishes new public authorities or provides for functions of an EU authority to be exercised by a UK public authority or that creates or widens a criminal offence must be put before Parliament before it is made (subject to special rules which apply in urgent cases). And all other instruments are subject to annulment by a resolution of either House of Parliament within a limited period after they are passed.

None of this is as good as full scrutiny (not least because it essentially limits Parliament to simply approving or rejecting the legislation, rather than providing full scope for amendment). And there is room to debate whether the categories of secondary legislation expressed to be subject to advance Parliamentary scrutiny are too narrowly drawn. But it should be possible, with a little bit of adjustment, to find the right balance.

# Areas of legal uncertainty – some examples

## Unpicking what is and is not "retained EU law"

### What happens to directly effective EU laws that are only partially applicable on exit day?

The Bill proposes that EU legislation that is directly effective in the UK (ie legislation that applies in the UK automatically, without the need for UK implementing legislation) will form part of UK law on Brexit if it is "operative immediately" before exit day. This is defined to cover EU legislation that is "in force and applies immediately before exit day".

While the effect of this provision is abundantly clear and certain in relation to most directly effective EU law, it is much less clear what effect it will have in practice where legislation is in force but only partially applies before exit day. A good example is the Prospectus Regulation (EU 2017/1129, known as PDIII). The Prospectus Regulation came into force on 20 July 2017. A couple of provisions apply from that date, but the bulk will apply from July 2019. It is not entirely clear from the Bill how (if at all) the Prospectus Regulation will operate in practice in the UK post-Brexit. Clarification on this point would be welcome for entities considering their prospectus obligations, to avoid uncertainty as to which prospectus regime will apply to their securities transactions post-Brexit. And it will be important in this context to have an eye to the implications of any clarification from an equivalence perspective.

### What about laws which don't clearly fall into any of the categories of retained EU law?

In addition to dealing with directly effective EU legislation, the Bill also provides that "EU-derived domestic legislation" will be retained as part of UK law on exit day. Broadly this covers legislation made under (or for a purpose mentioned in) certain provisions of the European Communities Act and related legislation, as well as legislation "relating otherwise to the EU". Again, the effect of this provision is largely certain, but there are areas where its effect is less clear. To take an example, when the Bank Recovery and Resolution Directive (**BRRD**) was given effect in UK law, the UK Treasury's transposition note stated that many BRRD provisions were already part of UK law under the Banking Act 2009. It is unclear whether those provisions of the Banking Act should now be construed as "EU-derived domestic legislation" and therefore within the definition of retained EU law, given that they pre-dated BRRD and were not initially made under the European Communities Act power. This has no impact on the Banking Act itself, as the Act will remain in force and effective whether or not it falls within the scope of this definition. But it could conceivably have an impact on how these provisions of the Banking Act are construed, as the Bill provides that UK courts must have regard to decisions of the Court of Justice of the EU made prior to exit day and to retained general principles of EU law and EU competences, but only when construing retained EU law.

Similarly, it is unclear whether certain directly effective EU delegated acts will become part of UK domestic law on Brexit because they contain provisions which overlap with pre-existing legislation. Again, examples of this arise in the context of the Banking Act framework. The Bill provides that directly effective EU law will only become part of UK domestic law if (among other things) its effect is not reproduced in EU-derived domestic legislation. Uncertainty as to whether the relevant provisions in the Banking Act (and related subordinate legislation) should be treated as EU-derived domestic legislation therefore leads to uncertainty as to whether these delegated acts will form part of UK law on Brexit and indeed as to whether they are within the scope of the retained EU law that Ministers have the power to "remedy" by secondary legislation.

Some of this uncertainty as to how domestic legislation should be interpreted and construed when a directly effective EU regulation with a similar subject matter is in force arguably exists already. But the Bill puts a new emphasis on the issue as it inevitably uses new and different language to characterise legislation and distinguish between laws which will (and will not) be "retained" after Brexit. Again, therefore, some clarification would be welcome in this area.

### What directly effective rights will apply?

The Bill incorporates into UK law certain directly effective rights under the EU Treaties (ie those rights which are sufficiently clear, precise and unconditional to apply directly to individuals). The explanatory notes to the Bill suggest that it is the substantive right that will be incorporated into UK law rather than the text of the relevant treaty provision. This is inherently somewhat uncertain. It will be necessary to determine both which rights are directly effective and precisely how those rights are articulated as a matter of English law. However, it is difficult to see how this issue can easily be rectified in the Bill.

It is also unclear how some of these directly effective rights (which, according to the explanatory notes, include freedom of movement of workers, capital and services) will operate once the UK has left the EU. The extent to which any of these rights will be disapplied or modified, whether by delegated legislation or otherwise, is also unclear. Presumably there will be more clarity as additional legislation begins to be published.

## Use of delegated powers to remedy "deficiencies"

The Bill takes a very wide approach to identifying the "deficiencies" that can be dealt with by secondary legislation. Deficiencies include (but are not limited to), where the Minister considers that the retained EU laws are "redundant" or have "no practical application", confer functions on EU entities that "no longer have functions", or make provisions regarding reciprocal arrangements that "no longer exist or are no longer appropriate" (among other things).

This is perhaps inevitable in the circumstances – the UK Government has clearly not yet been able to review the entire European *acquis* to identify and categorise "deficiencies", making it very difficult to be more precise. But it does mean that there may be scope for debate as to whether some secondary legislation that Ministers propose to "prevent, remedy or mitigate" a deficiency is in fact necessary. As delegated legislation is open to challenge in the courts via an application for judicial review, there is also the risk that such legislation could be struck down once it has been made if it is found to be outside the scope of the delegated power. And of course there is likely to be even more room to debate whether any secondary legislation that is made represents an appropriate way to prevent, remedy or mitigate those deficiencies that do exist – eg whether it is appropriate to create or confer powers on a new or different public body or whether any powers conferred on such a body have been clearly drafted and provide for an appropriate level of regulatory oversight.

Uncertainty may also be created if some deficiencies in retained EU law are not dealt with ahead of exit day (or at least ahead of the end of any agreed transitional period). To take a simple example, it is unclear how references in retained EU law to Member States should be construed after exit day if not corrected by Ministers in advance. Similarly, EU legislation that is currently predicated on reciprocity might simply not work post-Brexit, yet if it is not corrected ahead of exit day it would be binding as a matter of UK law until Ministers make the necessary amendments. At the very least, the unilateral incorporation into UK law of some EU laws predicated on reciprocity (which include the Recast Brussels Regulation on jurisdiction and judgments (EU 2012/1215) and the Recast Insolvency Regulation (EU 2015/848)) might lead to odd or unhelpful outcomes.

While the Bill recognises the need for changes of this nature, it does not specify when those changes will be made. And it cannot be assumed that Ministers will necessarily amend all legislation that is currently predicated on reciprocity, whether before or after Brexit, as in some areas the UK Government may decide that the UK will continue to apply current rules, even absent formal reciprocity from the EU. Presumably the intention is that any necessary corrections will be made ahead of Brexit (or by the end of any transitional period) wherever it is possible to do so, and the explanatory notes to the Bill appear to suggest that this is the intention. However, given the size of the task and the fact that the precise terms of exit may not be agreed for some time, it is unclear whether this is achievable in practice.

### Interpreting retained EU law

The generally helpful provisions on the interpretation of retained EU law also leave some room for uncertainty. In particular, the Bill provides that where retained EU law is modified on or after exit day, the principle of supremacy of EU law can still apply to that modification "if the application of the principle is consistent with the intention of the modification". Similarly, it provides that the validity, meaning or effect of modified retained EU laws can still be decided by reference to case law from the Court of Justice "if doing so is consistent with the intention of the modifications". While on one level these are entirely understandable and sensible provisions, they may well be difficult to apply in practice.

## Areas of practical uncertainty

The Bill is clearly drafted in a way that seeks to maintain as much flexibility as possible for Ministers on timing (including on when exit day itself will be – the Bill simply confers powers on Ministers to specify the relevant date). This is understandable given the lack of clarity at this stage as to when (if at all) the UK and EU27 will agree the terms of the UK's withdrawal and as to whether a transitional period will be agreed.

However, it does create practical issues. In particular, it means it is likely to be unclear for some time what, if any, changes will be made to the legislative regime to deal with any such withdrawal agreement or transitional period (or indeed whether there will be sufficient time after any deal is agreed to do what is required to make those changes). If in any transitional period the UK will essentially continue to be treated by the EU as an EU Member State or as a member of the EEA, this would be relatively easy to provide for, but anything more bespoke may require more substantive legislative change.

As indicated above, it is also unclear when any delegated legislation will be published – and delegated legislation may itself need to be amended to reflect any agreement reached with the EU (for example in relation to continued reciprocity). Also, the Bill may well of course be amended as it makes its way through the legislative

process, irrespective of the position on the negotiations. So while the Bill provides a good indication of the direction of travel, it will continue to be difficult for businesses to make detailed plans for the new regime.

# Conclusions

Legislating for Brexit was always going to be an enormous and complex task. The publication of the Bill represents an important step towards completing that task. It puts in place the necessary framework to ensure legal continuity on exit and, although the timescales may be challenging, it does provide the UK Government with the flexibility it will need to ensure that the post-Brexit legislative regime reflects the outcome of the negotiations, whenever that becomes clear.

Having said that, the detail remains critical and many fundamental questions for businesses and citizens remain unanswered. Much of the commercially important legislation will be made by Ministers in exercise of their delegated powers. It is this highly technical legislation that will change the current regime and provide some of those answers. Drafting this legislation is a huge exercise. The UK press has reported that the UK Financial Conduct Authority has hired 15 lawyers (at a cost of up to GBP 2.5 million) to manage the process of adapting EU legislation in the financial services sphere into UK law. It is only once that delegated legislation starts being published that commercial parties will get a true sense of the changes that they will need to make to their compliance policies and business practices.

As discussed, it is also important to bear in mind that the post-Brexit regime may be significantly affected by the terms of any agreement between the EU27 and the UK. The Bill cannot provide unilaterally for continued reciprocity, whether in relation to judgments, mutual recognition of insolvency or otherwise (although if an agreement for continued reciprocity is reached between the EU and the UK, it could presumably be used to implement that agreement in the UK). So until the terms of any agreement are clear, the uncertainty in this area will remain.

All of this means that businesses will need to continue to track developments closely over the next year or so, to ensure they are well placed both to advocate for changes to proposed legislation where appropriate and to put in place updated practices where required. It will also be important to look ahead. In some areas, the key questions may not even have been identified at this stage (or at least not at a UK Government/EU27 level). One of the areas where businesses and industry bodies can contribute is by proactively identifying pertinent issues and sharing potential solutions to mitigate the risk of issues arising as exit day gets closer.

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