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Brexit Law – your business, the EU and the way ahead

Legislating for Brexit – is the UK ready for Brexit whatever the outcome?

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After months of debate, the UK Government has finally succeeded in passing a key piece of Brexit related legislation which will ensure that the UK has a functioning statute book on the day it leaves the EU. Despite hundreds of amendments being tabled by both Houses of Parliament and the Government being required to compromise in a number of key areas, the EU (Withdrawal) Bill (the **Bill**) received Royal Assent on 26 June 2018 becoming the EU (Withdrawal) Act 2018 (the **Act**). This briefing considers what changes have been made to the Act, the areas where uncertainties still remain and what the next steps are as regards the legislative framework required to implement Brexit.

Background

Although we saw hours of Parliamentary consideration, the Act is largely technical in nature and is required to ensure that legal certainty, continuity and stability is retained as the UK exits from the EU. Not only does it repeal the European Communities Act 1972 (**ECA**), the legal basis for EU law having effect and supremacy in UK law, with effect from the date of the UK's departure, it also:

- converts EU law as its stands at the moment of exit into domestic law and preserves laws made in the UK to implement EU obligations – this body of converted EU law and preserved domestic law is referred to in the Act as 'retained EU law';
- creates temporary powers to make secondary legislation to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left, so that the domestic legal system continues to function correctly outside the EU;
- brings to an end the jurisdiction of the Court of Justice of the EU (**CJEU**) in the UK;
- sets out Parliament's oversight of the outcome of the Government's negotiations with the EU on the withdrawal agreement under Article 50 of the Treaty on European Union (**TEU**) (the **Article 50 Withdrawal Agreement**) and the framework for the future relationship between the EU and the UK; and
- enables domestic law to reflect the content of the Article 50 Withdrawal Agreement once the UK leaves the EU.

Key changes

The House of Lords approved the House of Commons' amendments to the "meaningful vote" clause on 20 June 2018, effectively concluding the Act's passage through Parliament. Despite the core functions of the Act remaining largely the same, the Act has been amended in several significant ways during the Parliamentary process, including by the insertion of a requirement that any withdrawal agreement is approved by an Act of Parliament (expected to be by way of a forthcoming Withdrawal Agreement and Implementation Bill). We consider this and some of the other key changes below.

Timing

Several provisions in the Act, including the principal provision repealing the ECA, are triggered on 'exit day' which is defined as 11p.m. (UK time) on 29 March 2019 – two years after the Government triggered Article 50 of the TEU, commencing the process for the UK's withdrawal. It is interesting to note that the Act does not address directly the possibility of a transitional period as currently envisaged under the draft Article 50 Withdrawal Agreement. The definition of 'exit day' may however be adjusted where the two year time period under Article 50 TEU is extended as a result of the unanimous agreement of all Member States under Article 50(3) TEU.

Dealing with 'deficiencies' arising from the withdrawal – the Henry VIII power

For up to two years after exit day, the Act provides the Government with wide powers to amend 'deficiencies' in retained EU law and existing UK laws to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law which arises from the UK's withdrawal from the EU (which includes the consequence that the UK will cease to participate in the EEA Agreement). Whilst the term 'deficiency' can be expanded under the Act, it is intended to capture:

- provisions that have no practical application after the UK has left the EU;
- provisions on functions that are currently being carried out in the EU on the UK's behalf, for example by an EU agency;
- provisions on reciprocal arrangements or rights between the UK and other EU member states that are no longer in place or are no longer appropriate;
- any other arrangements or rights, including through EU treaties, that are no longer in place or no longer appropriate; and
- EU references that are no longer appropriate.

The Act provides that secondary legislation made under the power in this section can do anything an Act of Parliament might to deal with deficiencies. This could include altering Acts of Parliament where appropriate and sub-delegating the power to a public authority where they are best placed to deal with the deficiencies – for example, the Bank of England, the Prudential Regulation Authority and/or the Financial Conduct Authority (as applicable) in the context of financial services. However, the power is subject to restrictions – for example, it cannot be used to impose or increase taxation or fees, make retrospective provision, create a relevant criminal offence, establish a public authority or amend the Human Rights Act 1998.

Subordinate or secondary legislation arising as a result of this power can be made in one of two ways – with positive approval of both Houses of Parliament (the affirmative procedure) or in the absence of Parliament's express disapproval (the negative procedure). A revised schedule 7 to the Act sets out the Parliamentary scrutiny procedures that must apply – the affirmative procedure must be used for more significant legislative instruments such as ones that further delegate powers, create criminal offences or allow taxes to be levied.

Instruments being proposed for the negative procedure will go to the House of Commons "sifting committee". This will be a new committee tasked with looking at the draft legislation under the Act and it will have "10 sitting days" to make a recommendation as to the appropriate procedure – including requiring the affirmative procedure – thereby ensuring that each piece of legislation has the correct level of scrutiny within the Parliamentary process.

Status of retained EU law

One question that was unclear when the Bill was first introduced was whether retained EU law would be treated as primary legislation or delegated legislation. Section 7 of the Act provides that pre-Brexit EU-related domestic legislation maintains its original status whereas retained direct EU legislation (which is broadly any EU regulation, EU decision or EU tertiary legislation – which covers level 2 delegated and implementing acts – which forms part of domestic law by virtue of the Act) will be divided between 'minor' and 'principal' species of retained direct EU legislation.

The term 'principal' will capture EU regulations that are not EU tertiary legislation and the applicable provisions of the Act attaching to retained direct principal EU legislation should ensure that any future changes to this subset of law, as proposed by ministers, are more limited and subject to greater Parliamentary scrutiny.

'Meaningful' vote – Parliamentary approval of outcome of EU negotiations

As noted above, the Act provides that a withdrawal agreement with the EU can only be ratified if the following steps take place:

- the Government lays before each House of Parliament a statement that political agreement has been reached, a copy of the negotiated withdrawal agreement and a copy of the framework for the future relationship – this has to be a document which reflects the agreement in principle on the substance of the framework for the future relationship between the UK and EU27 post-withdrawal;
- the House of Commons approves the agreement and framework and the House of Lords has an opportunity to debate those documents; and
- an act has been passed which contains provision for the implementation of the withdrawal agreement.

The Act obliges the Government, so far as practicable, to ensure that the UK Parliament votes on the withdrawal agreement before the European Parliament does so. 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".

If by 21 January 2019 there is no agreement in principle on the substance of the arrangements for the UK's withdrawal and on the future framework, or the Prime Minister announces prior to that date that no deal has been reached, the Government is obliged within the required time frame 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").

Maintenance of environmental principles

The Act now also contains provisions covering future environmental legislation. This comes after agreement on a set of compromise amendments brought forward by Oliver Letwin, in response to a broader set of first amendments drafted by the House of Lords. These provisions commit the Secretary of State for the Environment to publish a draft environmental bill by the end of the year (expected to be called the "Environmental Principles and Governance Bill") which will:

- enshrine in law a number of existing environmental principles (including the "polluter pays"; the principles of access to environmental information, participation in environmental decision-making and environmental justice) which will ultimately apply to public authorities;
- impose a duty on the Secretary of State to publish a policy statement setting out how the Government should apply these principles in its policy making;
- impose a duty on Government ministers to have regard to these principles in circumstances set out in the bill;
- allow a new watchdog to be established with powers to take "proportionate enforcement action" including legal proceedings if necessary if it considers that Government ministers are not complying with environmental law as it is defined in the draft bill; and

– allow the Secretary of State to include any other appropriate provisions.

These provisions are relatively broad brush: they are contingent in nature and until the environmental bill is published the true extent of any change is clear. The precise reach of the new public authority will also not be established until much later. However, this part of the Act has been hard fought with the result that environmental law will remain a focus alongside the wider Brexit negotiations.

Customs arrangement

In addition to ensuring greater Parliamentary scrutiny of the withdrawal process, the Act also requires that prior to 31 October 2018, the Government is required to lay a written statement before both Houses of Parliament which outlines the steps taken during negotiations to seek an agreement to participate in a customs arrangement as part of the framework for the UK's future relationship with the EU.

Remaining areas of uncertainty?

In July 2017, we highlighted a number of areas of legal uncertainty arising from the Bill. Despite the changes made to the Act as it progressed through Parliament, most remain and you can find our summary of the issues that these cause here. Taking a couple of points though, we would add the following commentary.

In-flight legislation

As we highlighted in July 2017, the Act ensures that direct EU legislation (i.e. legislation that currently 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 – that is, it is in force and applies immediately before exit day. It does not appear to cover inflight legislation – ie legislation that is in force on exit day but not yet in application. Whilst this distinction will be important in a number of areas, a key one for the financial services industry will be in relation to the new prospectus regime that came into force on 20 July last year. As we noted previously, whilst a couple of provisions applied from that date and a couple more will apply from 21 July this year, the bulk of the regime will not apply until July 2019.

Our interactions with HM Treasury and the FCA since the Bill was published have broadly indicated the merit in bringing the new Prospectus Regulation into the UK's post-Brexit framework in full. The expectation is that the Prospectus Regulation will become applicable in the EU and the UK in full during any transitional period and that amendments to the UK legislative regime will be required to ensure the full Regulation continues to apply in the UK once the transition period comes to an end. This would not appear to be the case in the event of a 'hard' Brexit on 29 March 2019 such that when the bulk of Prospectus Regulation comes into application in the EU, it seems it may not apply in the UK without further legislation. This may not be a key area of focus immediately following the withdrawal. Similar considerations may apply to other areas of EU legislation where the law applies in stages with some provisions having application before exit day but some not doing so until afterwards.

It is worth noting that the position for EU derived domestic legislation (i.e. secondary legislation that was made under section 2(2) of the ECA) is different in that such legislation will remain in place and continue to have effect on and after the exit day, even if it is not yet in force.

Remedying 'deficiencies' – reciprocity

In July 2017, we highlighted that EU legislation that is currently predicated on reciprocity might simply not work post-Brexit and that whilst the Bill recognised the need for changes of this nature, it did not specify when those changes would be made or how they might be made given the Government may not have a clear view on which areas of reciprocity might need to continue as a result of progress in negotiating the future UK-EU27 relationship.

We now know that the Government has been preparing secondary legislation under the power to remedy 'deficiencies' in preparation for the prospect that a 'hard' Brexit will be the outcome, thereby ensuring the UK will still have a functioning statute book that is able to deal with cliff-edge issues. As a result, we understand that the general approach of the

instruments will be to default to treating EU Member States in the same way the UK currently treats other third countries meaning that the UK will not unilaterally continue to recognise matters requiring reciprocity coming from the EU. There will, however, be exceptions to this approach – for example, the proposed temporary permissions regime that will allow EEA financial services firms to continue operating in the UK for a time-limited period once passporting falls away.

To the extent the Article 50 Withdrawal Agreement is ratified and the proposed transitional arrangements become legally binding, secondary legislation made to deal with 'deficiencies' will need to be withdrawn and replacement instruments will only be written once the future relationship with Europe is known. At that point, the UK legislative framework may need to provide for areas of reciprocity where negotiations have been successful.

Next steps

Secondary legislation

The granting of Royal Assent means that the Government can now start to use the powers in the Act to prepare the UK statute book for the UK's exit from the EU. In a press release published on 26 June 2018, the Government confirmed that this work would commence in the coming weeks as the Government departments start to lay the relevant secondary legislation to Parliament. The press release stated that "*In total, it's expected that around 800 pieces of secondary legislation will be needed*". Several hundred more are expected under the other Brexit-related Acts referenced below.

Each Government department is responsible for drafting the statutory instruments that relate to its areas of responsibility – for financial services, this is HM Treasury. The critical time for comment and resulting amendments is before the instrument reaches Parliament so the key issue relating to the Brexit secondary legislation is whether there will be a consultation period or other opportunity for comment. The approach currently appears to differ across Government departments with no consistent framework being established by the Department for Exiting the European Union (**DexEU**).

Financial services

On 27 June 2018, HM Treasury published a paper which sets out its approach to laying financial services statutory instruments. Whilst the Government has stated that it is confident that transitional arrangements will be in place between 29 March 2019 and 31 December 2020, as indicated above, it has had to plan for all eventualities. As a result, the financial services instruments have been drafted on the basis that there will be a 'no deal' scenario. To the extent the Article 50 Withdrawal Agreement is ratified and the transitional arrangements become legally binding, these instruments will be withdrawn from the Parliamentary process and new ones will only become available once the structure of the future relationships with Europe are known.

The contingency preparations for financial services legislation is often referred to as 'onshoring'. These instruments are not intended to make policy changes, other than to reflect the UK's new position outside the EU, and to smooth the transition to this situation. HM Treasury plans to delegate powers to the UK's financial services regulators to address deficiencies in the regulators' rulebooks arising as a result of exit, and to the EU Binding Technical Standards (**BTS**) that will become part of UK law. Such sub-delegated powers will be subject to broadly the same constraints as HM Treasury's use of the Act's powers, as well as additional mechanisms to ensure robust HM Treasury oversight. It is expected that a statutory instrument to achieve this will be one of the first laid under the new Act.

HM Treasury intends to lay the first financial services onshoring instruments 'soon'. Among the first instruments laid will be those delivering the temporary permissions regime (which would allow EEA firms to continue operating in the UK for a time-limited period after the UK has left the EU and passporting rights have been lost), the temporary recognition regime for central counterparties (as mentioned above) and the instrument sub-delegating the power to fix deficiencies in BTS and regulator rulebooks to the financial services regulators.

Further instruments fixing deficiencies in EU legislation will be laid over autumn 2018 into early 2019. HM Treasury plans to lay these in groups, with some of the first to be laid in autumn covering significant files relating to prudential regulation and capital markets. HM Treasury plans to publish drafts of these instruments and accompanying explanatory

information over the summer, ahead of laying, to give stakeholders an opportunity to engage and familiarise themselves with the draft provisions.

Other acts

There will also be other acts (once finalised) relating to data, the customs regime, trade policy, immigration, fisheries, agriculture, nuclear safeguards and international sanctions. A number have already received Royal Assent whilst others are still progressing through Parliament. The list below provides an update on each piece of legislation:

- ***Data*** – This received Royal Assent on 23 May 2018 and, amongst other things, attempts to ensure that on leaving the EU, the UK has an 'adequate' data protection regime compared to that of the EU.
- ***Customs regime*** – The Government introduced the Taxation (Cross-border Trade) Bill (previously known as the Customs Bill) to the House of Commons on 20 November 2017 following the publication of a White Paper in October. The Bill covers the tax-related elements of the UK's post-Brexit trade policy and the main purpose is to legislate for a new customs regime, to be in place by March 2019. The Bill provides for a range of negotiated outcomes, including an implementation period and a contingency scenario in case the UK leaves the EU without a negotiated settlement.
- ***Trade policy*** – Following the publication of a White Paper, the Government introduced the Trade Bill to Parliament on 7 November 2017. The Trade Bill, together with the Taxation (Cross-border Trade) Bill, forms part of the Government's wider commitment to seek continuity after Brexit for the UK's current trade and investment relationships, including those covered by EU free trade agreements with other countries and other EU preferential arrangements.
- ***Nuclear safeguards*** – On 26 June 2018, the Nuclear Safeguards Bill received Royal Assent and became the Nuclear Safeguards Act 2018. The Act allows the Government to make regulations relating to nuclear safeguards which are processes that allow countries to show to the international community that civil nuclear material is used for peaceful purposes. The Act also enables the current nuclear safeguards arrangements under Euratom to continue to apply to the UK after Brexit if necessary. Most of the Act will come into force on a date to be appointed by regulations, although provisions on commencement, extent and requiring the Secretary of State to report on nuclear safeguarding arrangements for the UK came into force on 26 June 2018.
- ***International sanctions*** – The Sanctions and Anti-Money Laundering Bill received Royal Assent on 23 May 2018. The Sanctions and Anti-Money Laundering Act 2018 will give the UK the necessary legal powers to continue to implement sanctions post-Brexit, including maintaining existing sanctions regimes currently imposed through EU law, and providing the necessary legal underpinning for the UK to decide when and how to take action against new threats.

Practical comment

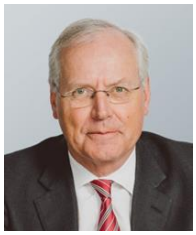
Despite the on-going uncertainty as regards the political negotiations, the Act is a welcome first stage of the vast legislative programme that the UK will be required to finalise over the next eight months to ensure that there is a functioning statute book whatever the outcome of negotiations. The size and complexity of the task ahead should, however, not be underestimated.

The Government has started to publish the instruments amending retained EU law but the first trickle are relatively uncontroversial. The more weighty items are expected during the course of the summer with limited public consultation expected for a number of reasons. Given the scale of the changes required to be made in areas such as financial services, the limited time for review and analysis, particularly to identify any unintended consequences, is daunting. This comes on top of the restructuring analysis and implementation that firms are facing across the spectrum causing internal resourcing to become even more stretched.

Your Allen & Overy contacts

Oonagh Harrison
Senior PSL - Brexit
Management
+44 20 3088 3255
oonagh.harrison@allenovery.com

Karen Birch
PSL Counsel
Litigation
+44 20 3088 3737
karen.birch@allenovery.com



Richard Cranfield
Partner
Corporate
+44 20 3088 3200
richard.cranfield@allenovery.com

Daniel Shurman
Partner
ICM
+44 20 3088 2855
daniel.shurman@allenovery.com

David Campbell
Partner
Banking
+44 20 3088 4758
david.campbell@allenovery.com

Damian Carolan
Partner
Banking
+44 20 3088 2495
damian.carolan@allenovery.com

Lydia Challen
Partner
Tax
+44 20 3088 2753
lydia.challen@allenovery.com

Angela Clist
Partner
ICM
+44 20 3088 2437
angela.clist@allenovery.com

Jennifer Cresswell
PSL Counsel
ICM
+44 20 3088 4872
jennifer.cresswell@allenovery.com

Jane Finlayson-Brown
Partner
Corporate
+44 20 3088 3384
jane.finlayson-brown@allenovery.com

Sarah Garvey
Counsel
Litigation
+44 20 3088 3710
sarah.garvey@allenovery.com

Matthew Hartley
Partner
ICM
+44 20 3088 2824
matthew.hartley@allenovery.com

Sarah Henchoz
Partner
Litigation
+44 20 3088 4810
sarah.henchoz@allenovery.com

Etay Katz
Partner
Banking
+44 20 3088 3823
etay.katz@allenovery.com

Bob Penn
Partner
Banking
+44 20 3088 2582
bob.penn@allenovery.com

Maria Stimpson
Partner
Corporate
+44 20 3088 3665
maria.stimpson@allenovery.com

Kate Sumpter
Partner
Banking
+44 20 3088 2054
kate.sumpter@allenovery.com

Matthew Townsend
Partner
Corporate
+44 20 3088 3174
matthew.townsend@allenovery.com

Richard Tredgett
Partner
ICM
+44 20 3088 2467
richard.tredgett@allenovery.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.