

INITIAL THOUGHTS ON THE EUROPEAN UNION (WITHDRAWAL) BILL

Today, the UK Government published a Bill that will convert the body of European Union (EU) legislation into UK law at the point when the UK exits the EU, the European Union (Withdrawal) Bill (the Bill).

This Bill would repeal the European Communities Act 1972 and put in place enabling legislation to amend, modify and (if necessary) repeal other legislation in order to end the supremacy of EU law in the UK. The majority of today's Bill is dedicated to setting out how EU law will be immediately adopted into UK law at the time of the UK leaving the EU (exit day) and aims to provide a framework to ensure certainty and consistency. In doing so, the Bill addresses fundamental questions on deficiencies and lacunae that are likely to arise.

Needless to say, the success of adopting existing EU law will be vital for the UK's economic future following its exit from the EU. The UK's pre-eminence as a centre for financial and professional services depends on its effective regulatory regime, its favourable business environment and the efficacy of its legal system. Much of the legislation underpinning this, including in highly regulated sectors such as financial services, comes directly from EU law. Therefore, a significant part of the Bill looks at the potential difficulties arising from the withdrawal and conversion of this body of EU law into UK law and how these issues can be best addressed up-front. However, the fact that this is an unprecedented exercise of immense scope and scale should be borne in mind.

At the same time as it published the Bill (and a set of explanatory notes), the Government also published three position papers in respect of areas where it has identified that further clarification (and negotiation) will be required. The most significant of these - the position paper on "Ongoing Union judicial and administrative proceedings" (the Paper) - outlines the Government's initial position with regard to proceedings that are ongoing at the point of the UK's exit from the EU. We consider the potential implications for UK businesses if the proposals outlined in this position paper are ultimately enacted further below.

This Bill is just the beginning, a first step and a framework, and will certainly be followed by a plethora of legislation. It would be premature to provide any detailed commentary on the Bill. However, a first review points to a number of general considerations, which are likely to permeate all aspects of its detailed implementation in the months to come. The principal issues are:

1. the status of EU law after Brexit;
2. the jurisdiction of the Court of Justice of the European Union (CJEU); and
3. secondary legislation.

1. THE STATUS OF EU LAW AFTER BREXIT

Section 3 of the Bill preserves existing direct EU legislation "so far as operative immediately before exit day". The category of legislation that is preserved is widely drawn and encompasses existing UK legislation which is tied to EU law, domestic law which implements EU law and regulations which are currently part of English law as a result of the direct effect of that EU legislation in the UK.

While this is clearly intended to ensure continuity for business post-Brexit, a source of uncertainty arises from the provisions of section 3(3)(a), which provides that, "in the case of anything which comes into force at a particular time and is stated to apply from a later time", the law is continued into UK law as "it is in force and applies immediately before exit day". This means that, where EU legislation has been adopted prior to exit day, any part of it that has not taken effect before that day will not become effective in UK law.

To take two examples of the practical consequences this may entail: the provisions of the EU Prospectus Regulation (PR) are due to come into force three stages:

1. 20 July 2017 (before scheduled exit day)
2. 20 July 2018 (before scheduled exit day)
3. 21 July 2019 (after scheduled exit day)

The bulk of the provisions come into force on 21 July 2019. The effect of the Bill would be that the PR provisions that come into force in 2017 and 2018 would be enacted in or adopted into UK law. (Indeed, the provisions due to come into force in 2017 have already been implemented in UK law and will take effect from 20 July 2017.) However, the provisions due to come into force in July 2019 would not make it into UK law. That is, provided exit day is not postponed.

To take a further example from a different context: a directive relating to the approximation of laws of Member States on trademarks has been adopted by the EU. Most of the provisions must be implemented by member states by 14 January 2019, i.e. some two-and-a-half months before exit day. However, the implementation deadline for one provision of the directive is 14 January 2023. Under the Bill, this provision would not be preserved as part of UK domestic law.

These are just two examples of a myriad of EU legislative acts, where legislation will have only partly entered into force prior to Brexit and where there will be considerable uncertainty about how the unimplemented but enacted legislation will be applied in the UK post-Brexit.

2. THE JURISDICTION OF THE COURT OF JUSTICE OF THE EUROPEAN UNION (CJEU)

This question has been the subject of considerable debate prior to the Bill's publication and that debate is likely to continue. The Bill confirms that the principle of the supremacy of EU law will continue to apply in relation to existing EU law as implemented and adapted under the provisions of the Bill into UK domestic law. That is, however, subject to a number of caveats.

First, under the Bill it is open to the UK Supreme Court to overturn any EU case law and therefore it can be envisaged that there may be a number of challenges to existing interpretations of EU law in the UK courts after exit day. Moreover, post-exit day, English courts will no longer be able to refer any matter to the CJEU (s6(1)(b)) and will not be bound by any principles laid down or any decisions by the CJEU after exit day (s6(1)(a)). These provisions in themselves are likely to raise important questions; for example, in relation to decisions in EU merger or antitrust cases made by the European Commission pre-exit day, but appealed subsequently to the European Courts post-exit day. The Paper acknowledges the need for clarity on such pending proceedings, but there appears to be a tension between such a wish and these provisions of the Bill.

What is clear is that there will be increasing scope for divergence between EU and UK legal principles and precedents following exit day, such that those doing business in both the EU-27 and the UK may find the same law interpreted differently in the two jurisdictions.

The Paper also raises a number of significant points of primary relevance to UK business in relation to issues arising from changes in the treatment of cases which are pending at the time of withdrawal. The Paper recognises that once proceedings have reached beyond a certain point it is right that they should continue before the CJEU, notwithstanding the fact that the general rule is that CJEU jurisdiction should cease over the UK post-exit day. The Paper suggests that to determine the point at which a case should continue before the CJEU will depend upon the type of case, the point it has reached and a variety of other considerations regarding the status of the proceedings, including "the purpose of continuing cases which are aimed at incentivising compliance with EU law when EU law will no longer apply to the UK". This is clearly a sensitive issue,

since by definition any judgment of the CJEU is intended to incentivise compliance with EU law.

More controversially, the Paper proposes that the CJEU should not remain competent to rule on cases on which it has not been seized before the date of withdrawal, even where the facts of the case arose before exit day. This position is likely to come under significant legal and political scrutiny, since, if the facts of the case arise at a time when EU law is applicable (for example, concerning an individual's right to remain in the UK), that includes a right to seize the CJEU as the competent court and arguably this right is being retrospectively withdrawn by the terms of the Bill.

The Paper describes its proposals as the UK Government's "preferred position", no doubt anticipating that negotiation and parliamentary scrutiny may require them to reconsider the position.

3. SECONDARY LEGISLATION

The Bill gives Ministers wide ranging executive powers to deal with "deficiencies arising from withdrawal". These so-called "Henry VIII powers" allow Ministers to enact secondary legislation which would otherwise be made by an Act of Parliament. The Bill stipulates that, for the most part, it does not grant Ministers the power to impose or increase taxation or to amend, repeal or revoke the Human Rights Act or various legislation relating to devolution. Ministers have a two-year period in which to legislate in this way, which runs from exit day.

The Bill provides for different forms of Parliamentary scrutiny over the exercise of these powers. A small number of provisions are subject to what is known as the "draft affirmative resolution procedure". This means that the statutory instrument may not be made until a draft has been laid before and approved by a resolution of each House of Parliament. These include acts to: (i) establish a public authority in the UK; (ii) transfer any function of an EU authority to a UK authority; (iii) provide for any function of an EU entity or public authority to be exercisable by a UK public authority; (iv) impose a fee in respect of a function exercisable by a public authority in the UK; (v) create or widen the scope of a criminal offence; or (vi) create a power to legislate.

It is clear from this list that the majority of executive powers under the Bill will be exercisable via either the "negative resolution procedure" or, in urgent cases, the "made affirmative procedure". Instruments made with the "negative resolution procedure" (i.e. those areas not listed above as requiring parliamentary scrutiny before approval) will come into force

immediately upon being made by the Minister but will be subject to subsequent annulment by a resolution of either House. The "made affirmative procedure" applies where, "by reason of urgency", certain instruments which would otherwise be subject to parliamentary approval before coming into force (under the "draft affirmative" procedure) may come into force before being debated. They must then be ratified within one month or cease to have effect.

The potential scope and impact of such secondary legislation, is well illustrated at paragraph 114 of the explanatory notes on the Bill, where it is observed that it may extend to "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". So, for example, the powers currently exercised by the European Commission in regulating wide areas of activity ranging from the marketing of medicinal products through to agriculture, fisheries and banking supervision will, as part of the Bill, be delegated by secondary legislation to new or existing UK authorities. Businesses which are currently subject to EU regulation, or standards made or supervised by EU institutions, would find new UK public authorities taking over those functions in a manner to be defined by secondary legislation.

In some cases, the analogous UK authority may be obvious. Functions currently assigned to the European Securities and Markets Authority may well be transferred to the Financial Conduct Authority. Those assigned to the European Union Intellectual Property Office will likely shift to the UK's own Intellectual Property Office. However, in many cases there may be no obvious UK analogue and a new body may need to be created.

Moreover, the Bill provides the option that the functions of such EU entities or authorities may be "replaced, abolished or otherwise modified" (article 7(5)(a)(iii)), potentially removing existing approval processes that arguably provide valuable procedural safeguards. It is particularly striking that, whilst shifting competence from an EU authority to a UK authority requires regulations to be subject to the more critical affirmative resolution procedure, removing an approval process entirely appears to be subject to the less stringent negative resolution procedure.

Most significantly the withdrawal agreement between the UK and the EU is to be implemented into UK domestic law by secondary legislation.

It is worth noting that no exercise of ministerial power to make secondary legislation under the Bill is subject to select committee scrutiny in accordance with a "super affirmative" procedure. Therefore, the withdrawal agreement will not be accompanied by all the safeguards afforded by primary legislation and full parliamentary scrutiny. This is likely to encounter significant opposition during the passage of the Bill.

Finally, the Bill specifically disapplies the usual requirement for ministers to review the regulations they produce and publish a report setting out their conclusions. This further underscores the potential lack of scrutiny that secondary legislation passed in connection with EU law and the UK's withdrawal will encounter.

Clearly, against this background it is imperative that businesses look carefully at all those areas which may be affected by EU law, regulation or practice, so as to be in the best possible position to influence the Government's evolving thinking as early as possible on how the process of dealing with these lacunae or deficiencies will ultimately be addressed in the proposed secondary legislation.

CONCLUSION

The issues considered above are purely illustrative of the fact that the Bill introduces some of the most far-reaching and complex legislative changes into UK domestic law in the post-War era, which will have a significant impact on most areas of UK business activity. This is particularly true as many UK businesses will continue to be subject to diverging UK and EU law in respect of their continuing EU-wide operations after exit day.

Further briefing notes will address specific measures of change and implementation as these will undoubtedly develop over the coming months.

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