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THE EUROPEAN UNION (WITHDRAWAL) BILL - HOW EU LAW WILL AFFECT THE UK AFTER BREXIT

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Following on from its white paper in March 2017, the government has now introduced the European Union (Withdrawal) Bill (the 'EUWB') into Parliament. Formerly known as the Great Repeal Bill, the aim is to plug the legal gaps that would otherwise result from EU law ceasing to apply in the UK following Brexit.

There is no question that a measure of this type is needed to ensure legal certainty following Brexit. However, as currently drafted, the EUWB includes a number of ambiguities which belie its aims. The nature of its task also inevitably gives rise to constitutional questions about the appropriate degree of Parliamentary oversight where it delegates power to the executive to make and amend laws, as well as the balance of power between Westminster and the devolved legislatures in Northern Ireland, Scotland and Wales.

Leaving the EU will be the most fundamental change to the UK's legal system since it joined the EU in 1973. The EUWB is thus one of the most important pieces of domestic legislation for decades. Here, we examine how it works, as well as highlighting some points on which it is unclear or controversial.

The current position

EU law currently takes effect in the UK through the European Communities Act 1972. Under section 2(1) of the 1972 Act certain types of EU rights and obligations, which are intended to be directly effective, are given effect in the UK without the need for any further domestic legislation. These include rights in the EU treaties as well as EU regulations which contain detailed legal rules.

Other types of EU law are given effect through UK regulations made under section 2(2), or in some cases through separate Acts of Parliament. Such EU law includes directives which set out broad outcomes or frameworks but which leave it to each member state to make its own provision to achieve the required legal effect.

In terms of its application, EU law is 'supreme'. This means that where there is a conflict between EU law and UK domestic legislation, the latter can be disapplied - a principle which provides the only circumstance in which a UK court can disapply an Act of Parliament.

UK judges are also bound to follow decisions by the Court of Justice of the EU (CJEU) under section 3(1) of the 1972 Act.

Avoiding a legal black hole

The retention of the 1972 Act following Brexit would mean that directly effective EU law under section 2(1) would fall away, but regulations made under section 2(2) would remain. The Act also ties UK customs duties to those of the EU and makes provision for matters such as the common agricultural policy and the provision of information to EU institutions, which will not be appropriate following Brexit.

If we are to leave the EU, the only sensible course is to repeal the 1972 Act.

However, upon doing so, both directly effective EU law **and** the secondary legislation giving domestic effect to other types of EU law, will cease to have effect. This will leave substantial legal gaps in relation to those areas from which the UK has traditionally derived its laws from the EU.

A similar problem has traditionally been encountered where one country gains its independence from another in circumstances where the former has been part of the latter's legal system. For this reason, when southern Ireland ceased to be part of the UK, the first Constitution of the Irish Free State (as it then was) provided at Article 73 that all laws in effect at the coming into force of the Constitution would continue in force and effect until repealed or amended by the Irish parliament. Under clause 34 of the Scotland Independence Bill, similar provision would have been made for Scotland should it have voted to leave the UK in the 2014 independence referendum.

A new category of old law

Drawing on such precedents, the EUWB proposes to repeal the 1972 Act (clause 1) and simultaneously to create a new category of EU law - 'retained EU law'.

Retained EU law will be comprised of the four following components -

1. **EU-derived domestic legislation** (clause 2) - secondary legislation made under section 2(2) of the 1972 Act, and other domestic legislation which implements EU obligations, made prior to 'exit day'.
2. **Direct EU legislation** (clause 3) - EU law that has direct effect in the UK prior to exit day, such as EU regulations and decisions. It will be the English language text of such legislation that will be authoritative.
3. **Any remaining 'rights, powers, liabilities, obligations, restrictions, remedies and procedures'** which are available in domestic law through section 2(1) of the 1972 Act prior to 'exit day' (clause 4). This will include rights under EU treaties and directly effective provisions of directives.

   However, it will not apply to rights under directives which are 'not of a kind' recognised by CJEU or 'any court or tribunal' in the UK in a case decided before exit day (clause 4(2)(b)). Whether this will cause a stampede to the courts to have certain rights 'recognised' before exit day has yet to be seen, although if this clause is retained in its current form, questions around what 'of a kind' means will need to be resolved, together with whether the reference to 'any court' would include a lower court even where overturned on appeal. This will result in a lack of clarity as to which elements of directives will be incorporated.

4. **Retained EU case law** (clause 6(7)) - principles laid down by, and decisions of, CJEU in relation to the above three categories which have effect in EU law before exit day, except where excluded by other parts of the EUWB.

The intention therefore is to take a snapshot of (most) EU law as it applies in the UK on exit day and to bring that law within the UK's domestic legal framework.

However, in this case at least, 'exit' does not mean Brexit. The date of 'exit day' is to be set by Ministers in regulations made under the Bill (clause 14(1)), and could theoretically be set at a date after that on which the UK actually leaves the EU.

In the sections below we look at what is unclear and what is controversial in the EUWB.

Ambiguity one - the hierarchy of laws

The principle of supremacy of EU law **will not** apply to any legislation passed **after** exit day (clause 5(1)). However, the principle **will** apply in relation to the interpretation or disapplication of any enactment or rule of law passed or made **before** exit day (clause 5(2)). The latter applies even where that enactment or rule is amended after exit day, so long as the application of the principle is consistent with the intention of the modification (clause 5(3)).

This means that if there is any conflict between retained EU law and domestic legislation made before exit day, the retained EU law will prevail. However, Acts of Parliament made after exit day will be able to override retained EU law. This sounds simple but does give rise to some important questions - not least where the EU provision in issue is contained in a directive, with respect to which pre-exit day case law will need to be found to establish that it has been retained.

For example, what is the position with respect to Acts of Parliament made after the passing of the EUWB, but before exit day? Applying the usual concept of Parliamentary sovereignty, a court would be bound to hold that the later act was supreme and should not be interpreted in line with retained EU law, no matter what the EUWB states. However, it is likely that the courts will recognise the EUWB as a constitutional statute - like the 1972 Act and the Human Rights Act 1998 (the 'HRA') - which will trump a later Act of Parliament unless that later Act expressly states otherwise. It will be important to bear this in mind in drafting the other Bills to give effect to Brexit as outlined in the Queen's speech in June. As these are likely to be passed before exit day, but will not be intended to be interpreted in line with retained EU law, each should contain an explicit provision that they are not subject to the EUWB.

How too is retained EU law to be classified within the UK's hierarchy of laws - is it to be viewed as primary or secondary legislation? Only a partial answer is given in the EUWB. Once incorporated, direct EU legislation (directly effective regulations and decisions) will be treated as primary legislation for the purposes of the HRA. This means that it cannot be quashed by UK courts on the basis that it does not comply with the European Convention on Human Rights. However, no provision is made in relation to the status of direct EU legislation in other circumstances, which begs the question of whether it - and other elements of retained EU law - can be challenged on public law grounds such as unreasonableness or lack of certainty.

Controversy one - the Charter of Fundamental Rights

The first controversial element of the EUWB is the fact that the Charter of Fundamental Rights is explicitly carved out of the basket of EU law that will be directly incorporated into the UK's legal framework (clause 5(4)).

The reason given for this in the explanatory notes accompanying the Bill is that the Charter did not seek to create new rights but sought merely to codify rights and principles that were scattered throughout the body of EU law. The notes state that by converting the rest of EU law into UK law, those rights and principles will also be converted, meaning that no rights will be removed despite the fact that the Charter will not be incorporated.

However, the fundamental rights codified in the Charter are principles of EU law and, under paragraph 3(1) of Schedule 1 to the EUWB, there will no longer be a right of action in the UK based on a failure to comply with any principles of EU law.

The suggestion that no rights will be lost is therefore incorrect, as no longer will a UK court be able disapply primary legislation on the basis of incompatibility with the Charter - see for example the Benkharbouche v Embassy of the Republic of Sudan (currently on appeal to the Supreme Court) in which the Charter was used to disapply the State Immunity Act 1978 so as to allow a Sudanese embassy worker access to the Employment Tribunal.

It is trite law that a right without a remedy is no right at all.

Ambiguity two - the interpretation of retained EU law

Under clause 6(1), UK courts can no longer refer matters to the CJEU and are not bound by any principles laid down, or decisions made, by that court after exit day. A UK court may have regard to such decisions and principles - as well as anything done by the EU or any of its entities - after exit day if it considers it 'appropriate' to do so (clause 6(2)).

Retained EU law is to be interpreted in line with any relevant case law from the EU courts and any case law from the domestic courts which relates to relevant matters (clause 6(3)). The Supreme Court may depart from decisions of the EU courts where it considers it appropriate to do so (clause 6(4)(a)).

It remains to be seen how the lower courts will interpret 'appropriate' when considering how to treat developments in EU law after exit. However, it is likely that judges will pay greater attention to post-Brexit developments in EU law in relation to matters on which our

trade deal with the EU requires harmonious interpretation.

It will also be interesting to see how the courts will treat the principles of EU law. In EU jurisprudence these are intended to permeate the interpretation of EU law, but some of these principles have been carved out of retained EU law, with the remainder no longer being able to found a cause of action. It may be that the courts will simply base their decisions on common law principles which mirror EU principles - as the Supreme Court has recently done in a case regarding whether fees for the employment tribunal breach the principle of access to justice (R (Unison) v Lord Chancellor). Where a common law analogue cannot be found, EU principles may come to be treated in the same way as customary international law - used as an aid to interpretation and a source of inspiration for the development of the common law.

Controversy two - amendments to EU-derived laws

Another area of controversy is the wide range of powers given to ministers to amend retained EU law by secondary legislation which the minister thinks '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.' (Clause 7(1))

The explanatory notes state that the concept of deficiency is intended to cover circumstances where a retained EU law 'does not function appropriately or sensibly'.

Regulations made under this power have the ability to do anything that can be done by an Act of Parliament. This means that they may also amend Acts of Parliament - providing what is sometimes referred to as a 'Henry VIII power'. Ministers may also use regulations to establish new public authorities to carry out functions previously exercised by EU bodies (clauses 7(4) and (5)).

There are a number of limits imposed on the power in clause 7(1). It is time limited to two years after exit day (clause 7(7) - although exit day itself is a moveable feast). In addition, clause 7(6) contains a list of things that cannot be done through regulations, such as imposing or increasing taxation, making retrospective provision and creating new criminal offences for adults punishable by imprisonment of more than two years.

It is also stated that the power cannot be used to amend, repeal or revoke the Human Rights Act, although why such a carve out is needed is unclear as that Act does not implement EU law and will not form part of retained EU law.

Two problems arise with respect to the clause 7 power. The first is the lack of clarity in the broad terms in which clause 7(1) is framed. Clause 7(2) provides a non-exhaustive list of what might be classed as 'deficiencies'. It includes examples that one would expect, such as where a particular provision is redundant after Brexit or where it confers powers on EU bodies that can no longer exercise those powers in the UK. However, it also states that the concept of deficiency will cover circumstances in which the Minister considers that 'any reciprocal or other arrangements … are no longer appropriate, as a result of [Brexit]' (clause 7(2)(e)).

The white paper had referred to a power to 'correct the statute book' and the government's fact sheet on clause 7 states that the power cannot be used 'to change laws merely because the government did not like them before exit'. However, on its face the clause provides the ability to modify or repeal a retained EU law because the minister considered it to be inappropriate - or, as the notes have it, not 'sensible' - **after** Brexit. It is thus a power of astonishing breadth and will inevitably encompass questions of policy.

This leads on to the second problem, which is the relative lack of Parliamentary oversight of the exercise of that power. Under paragraph 3 of Schedule 7 to the EUWB, the default position will be that regulations made under clause 7 are subject to a negative resolution procedure. Such regulations will be laid before Parliament and will come into force automatically unless either House passes a resolution to annul them.

A limited number of regulations will be subject to an affirmative resolution procedure under which they will need to be positively approved by each House of Parliament. These include regulations creating new public authorities, legislative powers, creating new criminal offences or imposing certain fees (paragraph 1 of Schedule 7).

This means that regulations which include significant policy choices - such as where the Minister revokes a retained EU law on the basis that it is no longer appropriate - will receive the lowest level of Parliamentary scrutiny and often be subject to no debate.

The number of regulations made under clause 7 is likely to be vast and Parliament will not be able to scrutinise all of them in detail. However, the division between which regulations fall to be considered under the negative and affirmative resolution procedures is likely to take up a sizeable portion of the debate in Parliament during the passage of the EUWB.

Controversy three - devolved institutions

At present the devolved legislatures in Northern Ireland, Scotland and Wales cannot pass legislation which is incompatible with EU law. The white paper stated that the government expected there to be 'a significant increase in the decision-making power of each devolved administration' after Brexit. However, clause 11 states that the devolved administrations will be unable to pass legislation that modifies retained EU law in areas where their legislative competence was circumscribed by EU law prior to exit day.

This means that - although they will have some powers to modify certain forms of retained EU law - no new powers will automatically flow back to the devolved legislatures upon Brexit. The explanatory notes to the EUWB state that this is intended to be a transitional arrangement while decisions are taken on areas in which common policy frameworks are required across the UK. Where a common approach is not needed, clause 11 contains a power to release areas from the restriction on modifying EU law and the government hopes to work with the devolved administrations to quickly identify such areas.

Reaction from Scotland and Wales to the EUWB was immediate, with a joint statement from the First Ministers on the day the Bill was issued describing it as a 'naked power grab' which attacked the founding principles of devolution and could destabilise the Welsh and Scottish economies.

The explanatory notes to the EUWB state that legislative consent motions will be required for certain clauses of the Bill, including clause 11. The government will therefore ask the devolved legislatures to pass motions consenting to the relevant provisions.

In their statement, the Scottish and Welsh governments have said that they cannot recommend that legislative consent be given to the EUWB as it currently stands.

If any or all of the devolved legislatures withhold consent, what happens next will be a political question and not a legal one. In its decision in the Article 50 litigation, the Supreme Court was clear that the seeking of such consent is a constitutional convention which is unenforceable in the courts (R (Miller) v Secretary of State for Leaving the European Union). However, the current minority government may find it politically unpalatable to enact clause 11 as it currently stands in the teeth of opposition from the devolved legislatures.

Next steps

The House of Commons is currently in recess until 5 September 2017. When MPs return, the EUWB will receive its second reading with debates on 7 and 11 September. Its committee stage will then be timetabled, during which it will receive a more detailed examination. Given the importance of the EUWB, it is likely that this will take place on the floor of the House of Commons, rather than being delegated to an actual committee.

The debate around the EUWB is likely to be vigorous, with the retention of the Charter of Fundamental Rights one of Labour's red lines on Brexit. However, Parliament's ability to simply vote down the EUWB will be fettered by the need for some provision to retain EU law post-Brexit in order to avoid a legal black hole. It is also likely that some elements of the Bill have been drafted in suitably wide terms with a view to making concessions as the Bill makes its way through the legislative process.

Parliament's task will be to ensure that the Bill provides maximum clarity as to the legal order that will operate post-Brexit and that ministers' powers to amend retained EU law is appropriately circumscribed and scrutinised. That task must be conducted in the knowledge that the Bill must be passed as soon as possible to allow the even larger task of amending retained EU law to begin.

Both tasks are unenviable, and will be politically controversial. But both are absolutely crucial to ensure legal certainty in the years to come.

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