

Legally Leaving: the Great Repeal Bill White Paper

In outline

The triggering of Article 50 of the Lisbon Treaty by the United Kingdom Government on 29 March 2017 marked the start of the formal process of withdrawing from the European Union. Attention has now turned to the practicalities of implementing Brexit from a legal perspective.

EU law is given effect within the UK through the European Communities Act 1972 (ECA), which:

- gives effect to EU law within the UK domestic legal order;
- provides for the supremacy of EU law; and
- extends the jurisdiction of the Court of Justice of the European Union (CJEU) over the UK.

The first practical step of separation will be to repeal the ECA, thereby removing both the effect of EU law in the UK and the jurisdiction of the CJEU. The Great Repeal Bill will repeal the ECA with effect from the day the UK leaves the EU and incorporate all EU-derived law into the UK statute book, providing for continuity of law and its judicial interpretation.

On 30 March 2017, the Government published a White Paper titled “*Legislating for the United Kingdom’s Withdrawal from the European Union*” which describes the scheme of the Great Repeal Bill. The Bill itself has not been published.

For those who wish to know more about what the White Paper says and the mechanism of the Great Repeal Bill, this is covered in Part A.

For those interested in the challenges it poses and the omissions from the scheme, this is discussed in Part B.

A timeline for key Brexit negotiation milestones appears at the end.

First thoughts

At a time when military metaphor is overdone, it is nevertheless tempting to recall Field Marshall von Moltke’s observation that no plan survives contact with the enemy.

The first impression on reading the White Paper is that it operates at such a high level that it provides only a preliminary overview of the Government’s plan. Reading it a week or so later one might question whether its scheme can sustain itself in the light of developments since its publication.

The repeal is limited; the White Paper describes a Bill about continuity. The Great Repeal Bill will provide for the continuity of all EU-derived law after Brexit-day as an important part of what the forewords by the Prime Minister and the Brexit Minister both describe as a “smooth and orderly” Brexit.

More particularly, the purpose of the Great Repeal Bill is to ensure that “the same rules and laws will apply on the day after exit as on the day before”. It will then be for “democratically elected representatives in the UK” to decide whether to change those rules. No-one it appears is arguing with this basic premise. It may be that the most acute judgment between parliamentary sovereignty and executive power, the extent of the Henry VIII powers discussed below, is just too difficult to lead with. As it says:

“The White Paper is the beginning of a discussion between Government and Parliament as to the most pragmatic and effective approach to take in this area.”

For what is described as a “pragmatic and principled” approach to the lift and drop of EU-derived law into the statute book, having sight of the draft legislation would have been useful for the ongoing debate.

Part A: The Mechanism

The great repeal

The Article 50 process gives effect to the UK's withdrawal from the EU as a matter of EU law. However, new primary legislation in the form of the Great Repeal Bill is required to sever the legal nexus between UK law and the EU's legal architecture created by the ECA. The White Paper confirms the Government's intention to implement this step on the day the UK leaves the EU (although see Part B on this).

The great copy and paste

Simply repealing the ECA and, in doing so, removing all EU law from effectiveness in the UK would not provide the certainty and stability that the Government is seeking to provide as the UK departs from the EU. To avoid creating holes in the UK statute book, the Government plans to convert EU-derived law as it stands at the moment the UK exits the EU into UK law. Doing so is intended to maintain the status quo and to provide businesses and individuals with comfort that there will be no sudden change to their rights and obligations. This conversion will be implemented in three ways:

- first by converting directly-applicable EU laws (such as Regulations) into UK law;
- second by preserving the existing UK law passed to give effect to the UK's EU obligations which are not directly applicable (for example, statutory instruments enacted under the ECA to implement Directives); and
- third by giving historic CJEU case law the same binding, or precedent, status in our courts as decisions of the UK's Supreme Court, and allowing UK courts to take account of EU treaty provisions in interpreting converted EU law, thereby providing continuity in how this converted law is interpreted.

EU regulations will not be "copied out" into UK law. Instead the Great Repeal Bill will make clear that EU regulations, as they applied to the UK the moment before it left the EU, will be "converted into UK law" and will continue to apply as a matter of UK law until Parliament decides otherwise. Where a conflict arises between converted EU law and any new primary legislation passed after Brexit, the newer legislation will take precedence over the converted EU law.

EU case law

It is stated that the Great Repeal Bill will not provide any role for the CJEU in the interpretation of the UK's EU-derived law, allowing "the UK to take control of its own laws". However, any question of interpretation will be determined in the UK courts by reference to the CJEU's case law "as it exists on the day we leave". This again is a continuity point. Case law is the practical interpretation of the underlying legislation and, if it were ignored, different interpretations could soon arise, altering the effect of the law without any policy decision to do so, so that the desired continuity would not be achieved. The proposal is that this case law is given the same status as decisions of Supreme Court. The Supreme Court varies from its own decisions exceptionally "when it appears right to do so". The White Paper says that the Government will consider whether limits should be placed on the power of the Supreme Court to diverge from previous CJEU decisions even in these exceptional cases. Parliament of course will also be free to overturn case law.

"Henry VIII" clauses - corrective and adaptive powers of the Executive

The White Paper acknowledges that while a portion of the EU law converted into the UK statute book by the Great Repeal Bill will operate properly unamended in its new domestic context, the majority of it will not do so without corrective/ adaptive action.

The Great Repeal Bill will provide the Government (and where appropriate the devolved administrations) with delegated powers to “correct” the statute book, where necessary, to rectify problems, inconsistencies and irrelevances occurring as a consequence of leaving the EU by using secondary legislation. These delegated powers, sometimes called Henry VIII clauses, are controversial as they will allow the Government to make law with less scrutiny from Parliament than applies to primary legislation.

However, the White Paper explains that in all legislative matters (not just Brexit) secondary legislation has a necessary and useful place within the legislative process. Secondary legislation often deals with matters that cannot be known or may be liable to change at the point when primary legislation, in this case the Great Repeal Bill, is being passed, and provides a level of detail not necessarily appropriate for primary legislation.

Primary legislation provides a framework within which the Government can propose secondary legislation for parliamentary approval and bring such legislation into effect through statutory instruments. The Great Repeal Bill will allow Parliament to see all statutory instruments and apply different levels of scrutiny using two existing procedures: the negative procedure (requiring no debate or vote, unless either House requires it) and the affirmative procedure (requiring debate and the approval of both Houses). The White Paper estimates that translation “corrections” will require between 800 and 1,000 statutory instruments, based on “a first trawl of the UK statute book by Government Departments”. These procedures will streamline this volume of corrections which, if implemented instead solely through primary legislation, would cause legislative gridlock.

The White Paper highlights the balance to be struck between:

- providing the Government with the necessary powers to deal with the complex and uncertain process of distilling a sensible and coherent translation of EU law into the UK statute book; and

- fixing suitable controls in place to ensure those powers are used only to implement such translation, resulting in a new body of converted EU law that is faithful to its original purpose.

While delegated powers to make secondary legislation will necessarily apply to a wide scope of legislation, the Government identifies that the purposes for which such powers can be used should be limited - “crucially, ... power will not be available where Government wishes to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit”.

The White Paper identifies the need to make corrections and adaptations to the converted EU law before the UK leaves the EU, to ensure that there is a functioning statute book in place on the day the UK leaves the EU. Therefore, the Government intends that any delegated powers sanctioned by Parliament will come into force as soon as the Great Repeal Bill gains Royal Assent (presumably later in 2017) and will be appropriately time-limited with a “sunset clause”. However, the White Paper tacitly states that late developments in the exit negotiations may make it impossible to plug all the legislative gaps at the point of exit, so the “smooth transition” may experience some turbulence.

Additional primary legislation

The White Paper confirms that the Great Repeal Bill will not make major changes to policy or establish new legal frameworks in the UK. Therefore, alongside the Great Repeal Bill, the White Paper announces the Government’s intention to introduce a number of further bills in preparation for Brexit in areas requiring parliamentary scrutiny. These bills will include a customs bill to establish a framework to implement a UK customs regime and an immigration bill.

Part B: The Missing Complexity

The Government's White Paper identifies and acknowledges a number of important issues that the Great Repeal Bill must address and cater for. However, it does not specify any concrete proposals for dealing with these issues. The task of legally separating the UK from the EU is admittedly a complex one, but the White Paper provides only an initial blueprint for how that task is to be addressed.

1. Immediate divergence

The mechanism described in the White Paper means that the equivalence of the UK's version of EU law with that in force in the EU itself may be short lived.

New regulations, laws or cases will emerge immediately and start the inexorable divergence. Case law will emerge post-Brexit that illuminates the law in force pre-Brexit. Regulations in force pre-Brexit will be amended or supplemented or even revoked post-Brexit. Businesses with significant EU connections may need to continue to comply with EU rules in practice in addition to any divergent UK law, applying a "highest common factor" approach. There may be an adverse impact on those businesses where the divergent decisions cannot be reconciled.

With a real possibility of specific sectors chasing EU equivalence as part of either a transitional regime or a sector-specific approach, a system which at exit might be expected to fit more or less neatly within identifiable parameters may morph into a shifting body of multiple variables.

2. A clean break

It has been acknowledged¹ implicitly since publication of the White Paper that there will not be a substitute free trade agreement at the point of exit and that the

UK will seek a transitional or implementation period. None of this is a surprise to businesses. There has also been an acknowledgement² that free movement of people is likely to continue beyond exit. The White Paper, however, emphasises the principle of a clean break from EU institutions, in particular the cessation of the jurisdiction of the CJEU in the UK. Should transitional measures or terms of the withdrawal agreement maintain, even to a limited degree, the legal nexus between the UK and the EU, the CJEU will almost certainly continue to have jurisdiction in the UK in such areas. The idea of a freeze-frame of EU-derived law (including case law) and no role for the CJEU at the point of exit might seem unlikely to survive the demands of the EU for any transitional period. Rather, the freeze-frame may (at least in relation to some areas of law) have to be at the end of the transition period, or conceivably a combination of an exit-day and end of transition period freeze-frames, although this may well be unmanageable.

3. EU agencies and the practicalities of implementing policy

The White Paper acknowledges that converted EU law may "be predicated on...access to an EU regime or system" and will therefore require corrections and adoptions. These references to the "EU regime or system" hint at the significant role of EU agencies within the EU infrastructure. These agencies, defined as "legal entities (separate from EU institutions) set up to perform specific tasks under EU law" play a role, often as regulator, in the implementation of EU policies.

Alongside the legislative process outlined in the White Paper, the Government and the civil service need to procure the capabilities and resources required to implement policy within the EU-derived law in areas previously covered by EU agencies. While the continued authority of EU agencies in relation to UK activities post-Brexit would undermine the Government's clean break goal, this is a challenging prospect. According to the

¹ "Theresa May's bad news for Brexiteers", Financial Times, 5 April 2017.

² "Theresa May suggests EU migration will continue post-Brexit", Financial Times, 5 April 2017.

Financial Times, “officials close to the negotiations say that the UK would have little choice but to take part in some EU agencies after 2019”.³

4. Catering for the withdrawal agreement and disputes

While the Article 50 letter to the European Council preceded the White Paper by just one day, there is only high level acknowledgement in the White Paper of the interaction between the negotiation of the terms of the UK’s withdrawal and the legislative process for separating the UK’s statute book from the EU’s. However, it is this interaction and the need, identified in the White Paper, for the Government to use delegated powers to implement the terms of the final withdrawal agreement, that will test the robustness of the legislative controls over the use of such powers. It is not straightforward to see how a constrained power to make “corrections” is fit for the purpose of implementing a unique withdrawal agreement. While the White Paper acknowledges the need to establish a suitable balance of power, it makes no proposals as to how that balance will be identified and enforced. It is in these areas, where the boundaries of any delegated powers are likely to be tested and possibly stretched, that disagreements are likely to arise. It remains to be seen what methods of resolution will apply to such disputes.

5. Defining converted EU law

The White Paper presents a simple theoretical mechanism for converting the *acquis* “as it stands at the moment of exit” into UK law. However, the reality of this conversion is not simple, not least because identifying what constitutes the *acquis* at any particular time is far from straightforward. The evolution of EU law will continue unabated post-Brexit and the lead times on these changes are measured in years, not days or even months. Therefore, the question where does the law stand,

is not black and white. Historic CJEU case law will have precedence in the UK post Brexit, but the definition of “historic” is left to be argued about. Current cases before the CJEU will continue interpreting EU law as it applied pre-Brexit after the UK has withdrawn. Legally, it will be up to the UK whether or not such precedents emerging post-Brexit bind the UK courts. There will also be new CJEU cases post-Brexit affecting the interpretation of pre-Brexit law. Practically, it may be difficult to ignore these new interpretations.

6. Correction and speed

The delegated powers are subject to constraints and the most used purpose applied as a constraint is to “correct the statute book ... to rectify problems occurring as a consequence of leaving” and is “designed to deal with deficiencies ... arising out of our exit”. Quite possibly one person’s correction is another person’s policy change. In addition, the existence of a problem needing “correction” does not obviously justify that “correction” being made by delegated power.

One of the case study examples given is where a piece of legislation contains a requirement to obtain an opinion from a European body. Once we leave the EU, that body will no longer provide an opinion, which is clearly a problem. The case study however asserts that the power to correct would allow the Government to amend the domestic legislation to either replace the reference to the opinion provider with a replacement UK body or to remove the requirement completely.

Can the complete removal of a requirement to obtain an opinion from an independent body be viewed as a correction? It must at least have the potential to affect policy. If the replacement body is a government minister or department, rather than an independent or supra-national body, how is it ensured that the remit and objectives of the substitute are the same as the body replaced? One answer might be to use the affirmative procedure for secondary legislation in such cases,

³ “UK set to keep EU regulations after Brexit”, Financial Times, 26 March 2017.

but it is currently unclear how the choice of available modes of secondary legislation will be made in practice.

The White Paper also states that there is a balance to be struck between the importance of scrutiny and the speed of the process. As our timeline shows, there will be very limited Parliamentary time to deal with translation corrections; not least as much detail will emerge in the later stages. Speed is of course a function of timetable. It is difficult to think of a more momentous legislative exercise than this nor to conceive of any other of similar magnitude where the need for speed has been a persuasive factor in diluting scrutiny. Pragmatically, these issues need checks and balances. It is important that if the constraints on use of delegated powers are referenced to purposes. Those purposes need to be very clearly articulated and in a way that secondary legislation that overreaches those purposes is capable of challenge and that the ability to challenge is not overridden by the Government's need for speed. One possible safeguard would be to provide for the subsequent review of the relevant secondary legislation. Another approach might be to empower an independent committee to scrutinize the use of the powers.

After thoughts

The White Paper repeats the claim that no deal is better than a bad deal. Whether this is right or wrong, the idea of continuity proposed in the White Paper is a necessary component of contingency planning both for a "no deal" scenario or a transitional glide-path to a new order that is based on ongoing equivalence. The aspiration must, however, be for an open and constructive debate on making the mechanism fit for purpose. No deal on the Great Repeal Bill will be a very dramatic outcome indeed.

Despite the number of complex issues still to be worked through and given: (i) the complexity of the task; (ii) the limited time for implementation; and (iii) the need for a smooth transition, the broad approach taken by the Great Repeal Bill is the only proposal currently tabled. The Bill is due to be published at the start of the next parliamentary session.

To return to the opening military analogy, Field Marshall von Moltke also observed that strategy is a system of expedients, the translation of knowledge to practical life, the improvement of the original leading thought in accordance with continually changing situations. With all that has happened in the week since publication (and in particular the acknowledgement that our participation in the EU infrastructure will survive exit in some form), almost regardless of any active consultation on the White Paper, the Great Repeal Bill that emerges seems likely to differ from the concept described. The specifics of the Bill will need to develop the original thought in accordance with continually changing situations, and the statutory instruments plugging the gaps may require iterative amendment, repeal and replacement both during the negotiating phase and after the UK has left the EU.

Timeline for negotiation of the UK's withdrawal from the EU

This timeline is based on information in the public domain as at 05/04/17

