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BREXIT

THE CONSTITUTIONAL ENDGAME AND THE NEED TO ACT NOW

BREXIT: THE CONSTITUTIONAL ENDGAME AND THE NEED TO ACT NOW

Service of notice under article 50 of the Treaty on European Union will fire the starting gun on the formal process leading to the UK's departure from the EU. The High Court will decide in October the much-debated question of whether the Government can choose on its own to give notice under article 50 or whether it needs legislative approval first. But the legal complexities are not confined to this initial stage. The end of the lengthy withdrawal process will also bring with it considerable uncertainties, as well as practical complications. These issues in the endgame influence, perhaps even dictate, what the UK needs to be doing now to prepare the UK for life outside the EU. The sooner legislation is brought forward to lay the groundwork for withdrawal and to remove the uncertainties, the easier it will be.

Article 50(1) of the TEU requires a member state that has decided in accordance with its constitutional requirements to withdraw from the EU to notify the European Council of its decision. What the UK's constitutional requirements are for this purpose will be the subject of court cases in England in October, *R (on the application of Miller) v Chancellor of the Duchy of Lancaster*, coupled with *R (on the application of Dos Santos) v Her Majesty's Government.* There is also similar litigation taking place in Northern Ireland. In short, the issue for the courts is whether the decision to serve the article 50 notice is one for the Government alone, acting under the Royal prerogative, or whether legislation is required. The legal issues raised by these cases have been discussed at length in academic blogs, in the press and at conferences.

The outcome of *Miller* will resolve the question of the UK's constitutional requirements to start the Brexit process, but there will remain many uncertainties as to what is required to end the process. After the UK has given its withdrawal notice, article 50(2) states the EU "shall negotiate and conclude" a withdrawal agreement with the UK. This agreement should "set... out the arrangements for [the UK's] withdrawal, taking account of the framework for its future relationship with the Union". Article 50(3) goes on to provide for the UK to leave the EU "from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification". This begs the question, for example, of the UK's constitutional requirements to bring into force a withdrawal agreement.

Faced with uncertainty as to the endgame, the Government may be chary about serving the article 50 notice and entering into withdrawal negotiations. Equally, the sheer volume of work required to prepare the UK's legal system for life outside the EU is such that this work needs to

start soon. It cannot realistically begin until the framework for what is to be done and how is established.

In these circumstances, there is much to be said for the Government laying before Parliament in the near future legislation aimed at resolving so far as possible the uncertainties over the entire withdrawal process and prescribing the parameters to ensure a smooth transition into the post-EU world. The course of negotiations with the EU, as well as other events, may bring surprises that require the adaptation of any plans but it is still better to have a plan than not.

The simple case: negotiations fail

Uncomfortable though it may be economically and diplomatically, constitutionally the position is relatively clear if the UK and the EU fail to reach a withdrawal agreement within the two-year period contemplated by article 50(3) of the TEU. In that case, the UK will leave the EU on the second anniversary of the UK's giving notice of its decision to withdraw, absent unanimous agreement to the contrary.

The possibility of the UK leaving the EU two years after serving the article 50 notice has potential implications for the timing of the notice. Leaving the EU on a random day is possible, but it will be easier, both for the UK and the EU, if the UK leaves the EU on 31 December in any year because the EU's finances and other administrative procedures operate on a calendar year basis (the UK clings to the historical curiosity of a financial year that starts on 6 April). The risk of there being no consensus between the UK and the EU within the two years therefore suggests that the withdrawal notice should be given on a 1 January in order to simplify later life.

The risk of automatic departure in two years also means that the UK must have its legal house in order for the post-EU situation within the two years. What is required to do this is discussed at greater length below but, in short, to have a realistic hope of doing satisfactorily the enormous amount of work required, the work needs to start in the near future. For that to be possible, the framework needs to be laid down sooner rather than later.

It is worth adding that, even if the UK and the EU fail to reach agreement within two years, the negotiators will not be able to pack their bags for a final time, abandoning the process. Many of the issues that need to be covered by a withdrawal agreement will not disappear (e.g. budget contributions and rebates, pensions of UK nationals employed by the EU, and so on), and will still need resolution. Agreement will remain overwhelmingly the best means of resolution even if it takes longer than two years to reach that agreement.

Entry into force of a withdrawal agreement: the EU

If withdrawal terms are agreed within the two-year period, the EU's treaties will cease to apply to the UK "from the date of entry into force of the withdrawal agreement" (article 50(3)). This raises the question of what the EU must do in order to bring into force a withdrawal agreement with the UK.

The EU has two requirements for the conclusion of a withdrawal agreement with the UK: first, the agreement must be approved by the European Council (i.e. the Governments of the member states), acting by qualified majority; and, secondly, the European Parliament must consent to the agreement (article 50(2)).

British MEPs in the European Parliament are not expressly prevented from voting on any motion to

approve the withdrawal agreement between the EU and the UK. In contrast, the UK is excluded from the calculations to determine a qualified majority within the European Council (ie 72% of the member states representing 65% of the combined population of those member states: article 238(3)(b) of the Treaty on the Functioning of the European Union). A withdrawal agreement therefore requires the support in the European Council of at least 20 of the EU's 27 members (excluding the UK), comprising 65% of the population of those 27 states. The population of Germany comprises some 18% of the EU's population (Germany's population of over 81 million is equal to the population of the 17 smallest member states), France 15%, Italy 14%, Spain 10%, Poland 9% down to Malta, which comprises 0.1% of the relevant population – indeed, the smallest eight member states, a sufficient number to block any withdrawal agreement, represent a combined 3.2% of the EU's population.

The EU may not be able actually to enter into the agreement ("conclude" it in the English language version of article 50) until it has met both requirements – at the least, any agreement must be subject to the condition that both these requirements are fulfilled. This has implications for timing of negotiations. EU negotiators commonly reach a consensus only at one minute to midnight on the last available day. This will not be practicable for a withdrawal agreement because the EU must complete these two stages before it is able to conclude the agreement. Time – quite possibly counted in months rather than days or weeks – must therefore be allowed after the negotiations are successfully completed in order to enable the EU to go through its internal processes. But when the EU does complete its formal processes, there is nothing to prevent the agreement coming into force immediately. No ratification or other approval from individual member states is required.

A withdrawal agreement is not the same as an agreement or agreements setting out the framework for the UK's future relationship with the EU, though what can properly be included in a withdrawal agreement is not entirely clear. If an agreement on future relations covers areas outside the EU's exclusive competence, as it may well do, each member state must enter into the agreement in accordance with its constitutional requirements, a process that tends to take at least two years from the terms being agreed and may require a referendum in some countries (and referendums can, of course, produce unexpected results). If an agreement covers only areas that are within the EU's exclusive competence, it generally requires the consent of the European Parliament and a slightly lower qualified majority within the European Council (55% of member states representing 65% of EU's population: articles 218 and 238(3)(a) of the TFEU), but not ratification by individual member states.

Entry into force of a withdrawal agreement: the UK

The UK's constitutional position regarding the entry into force of a withdrawal agreement is less clear than the EU's, but, as the law stands at the moment, it seems unlikely that a withdrawal agreement with the EU could enter into force without Parliamentary approval – at least, without the absence of Parliamentary disapproval.

The primary reason for this is that section 20 of the Constitutional Reform and Governance Act 2010 provides that the Government cannot ratify a treaty unless the treaty has first been laid before Parliament and at least 21 sitting days have passed without either House of Parliament resolving that the treaty should not be ratified. Ratification is any act that establishes as a matter of international law the UK's consent to be bound by the treaty (section 25(3), echoing the wording of article 7(1)

of the Vienna Convention on the Law of Treaties). A withdrawal agreement and an agreement setting out the UK's future relations with the EU would both be treaties for this purpose (section 25(1)).

If the House of Lords alone resolves that a treaty laid before Parliament should not be ratified, the Government can override the peers' resolution (sections 20(7) and (8)). But if the House of Commons resolves that a treaty should not be ratified, the Government cannot ratify the treaty. The Government may lay before Parliament a statement explaining why it considers that the treaty should be ratified; if a further 21 sitting days pass without the House of Commons resolving again that the treaty should not be ratified, the Government can then ratify (section 20(4)). If the House of Commons decides for a second time that the treaty should not be ratified, the Government can lay before Parliament yet another statement explaining why, in its opinion, the treaty should nevertheless be ratified, setting off another 21 day period, and so on and on (section 20(6)). But ultimately the House of Commons has the final say as to whether a withdrawal agreement can be ratified and therefore enter into force.

The politics surrounding a withdrawal agreement could complicate matters for the Government. For example, Brexiteers within Parliament might consider that the withdrawal agreement, coupled with any proposed agreement(s) as to the UK's future relations with the EU, kept the UK too close to the EU – that the UK had not taken back sufficient control from Brussels. They might therefore vote against ratification in order to secure a clean break from the EU on expiry of the two-year period. In contrast, Bremainers might hope that, if the withdrawal and other agreements never came into force, the UK's position would be so unattractive that the article 50 notice would be revoked (assuming that to be possible) and/or that another referendum or general election would be held on the question of whether the UK should really leave the EU on the terms then available. The Government could potentially be squeezed from both sides after the fashion of the opportunistic alliance between Michael Foot and Enoch Powell, two politicians from distant limbs of the political spectrum, that defeated proposals for the reform of the House of Lords in the 1960s.

A similar alliance of opposites prevailed in 1993 in an EU context, when the Conservative Government was defeated on a vote on the EU's Protocol on Social Policy (commonly referred to as the Social Chapter). This arose from an equally opportunistic, but well coordinated, alliance between Conservative eurosceptics and the Labour opposition, who opposed the Government's position for entirely different reasons. However, necessary conditions for the Government's defeat were a small Government majority in Parliament, a determined group of dissidents within the Government's party and a highly organised opposition, which had previously caused the Government to lose control of the Parliamentary process on the EU's Maastricht Treaty. Whether these necessary conditions will prevail at the time of any vote on a withdrawal agreement is open to question.

If the Government is not confident that a withdrawal agreement would pass the House of Commons, it could seek to rely on section 22 of the Constitutional Reform and Governance Act 2010. This provides that the Government can ratify a treaty if it is of the opinion that, "exceptionally", this should be done without the requirements of section 20 having been met. But the Government cannot rely on section 22 if it has already tried to use section 20 and either House has resolved that the treaty should not be ratified (section 22(2)). What might constitute sufficiently "exceptional" circumstances is anyone's guess, as is the extent to

which the courts might be inclined to look behind a Governmental decision on exceptionality. If the withdrawal agreement was concluded fewer than 21 days before the expiry of two years from the article 50 notification, that might constitute exceptional circumstances; but whether a fear that Parliament might reject the withdrawal agreement would be sufficient is more open to question.

Another possible means offered by the 2010 Act to avoid putting the withdrawal agreement at the disposal of Parliament would be to argue that the agreement was a "regulation, rule, measure, decision or similar instrument made under a[nother] treaty", in which case the procedures required by section 20 do not apply (section 25(2)). Article 50 of the TEU contemplates the possibility of a withdrawal agreement, but it seems far-fetched to regard a withdrawal agreement as a "measure, decision or similar instrument" made under the TEU.

Perhaps a little more realistically, a withdrawal agreement will also fall outside the scope of the Constitutional Reform and Governance Act 2010 if it is subject to a requirement imposed by Part I of the European Union Act 2011 (section 23(1)(c) of the 2010 Act). However, if the 2011 Act applies, there would be even more scope for Parliamentary activity than under the 2010 Act: the 2011 Act demands primary legislation, involving the full legislative procedure in both Houses of Parliament, not just the absence of a negative resolution in the House of Commons. In some circumstances, the 2011 Act even requires a referendum.

Part I of the 2011 Act imposes a requirement on a treaty "which amends or replaces the TEU or TFEU". The requirement is that approval must be given to the treaty by an Act of Parliament before the treaty is ratified. In addition to legislation, the Act also requires a referendum if the treaty does any of the numerous things listed in section 4 – essentially, passing additional powers to the EU or its institutions.

A withdrawal agreement and/or an agreement that sets out the UK's future relationship with the EU will not amend the TEU or the TFEU, but it might be arguable that, depending on their content, these agreements will replace the TEU and TFEU as far as the UK is concerned even if not for the continuing members of the EU. If so, the requirements of the European Union Act 2011 must be met. Alternatively, it might be that the UK's relationship with the EU will be so different that these agreements could not really be said to be replacements for the EU's treaties but, instead, to represent a wholly new era.

It is unlikely that Parliament had in mind a withdrawal agreement when it passed the European Union Act in 2011. The Act was passed in order to require a referendum if new powers were to be bestowed on the EU, which seems unlikely to be the impact of the withdrawal agreement – though the Government will need to bear in mind when negotiating withdrawal from the EU the risk of touching any of the referendum triggers in section 4. However, while an agreement that only takes back control from the EU does not need a referendum, approval by Act of Parliament may still be required if the treaty was construed as replacing the TEU or TFEU.

Whatever the consequences of the Constitutional Reform and Governance Act 2010 and the European Union Act 2011, it is clear is that, as UK law currently stands, the Government's signature on a withdrawal agreement does not guarantee that the UK will be able to bring the agreement into force. Beyond any political issues, there are uncertainties as to what legal steps must be taken to bring a withdrawal agreement into force, uncertainties that

will make negotiations over the treaty even more difficult than would otherwise be the case and that raise the risk of further court entanglement. The *Miller* and other litigation over what is required for the UK to give the article 50 notice can proceed at a relatively modest pace (by real world standards, if not by the courts'). Any litigation over the requirements to bring into force a withdrawal agreement may take place under far greater time pressure, tight against the two year deadline.

Entry into force of a withdrawal agreement: the terms of the agreement itself

A typical agreement, whether between commercial entities or sovereign states, would state expressly when the agreement is to come into force. Suppose that the UK and the EU enter into a withdrawal agreement, having completed their respective constitutional requirements, within the two-year period and that the agreement itself provides either for it come into force after the two-year period has expired or for it to come into force immediately but for the UK to leave the EU on a date that is after the end of the two-year period. It might, for example, be convenient for everyone if departure occurred on the following 1 January or on a later date in order to give businesses within the UK and the continuing EU time to adapt their structures or practices over a transitional period once the terms of departure are known. Similarly, the UK and the EU may need additional time to make or amend arrangements with third states.

Article 50(3) provides for the UK to leave the EU "from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification". Article 50(3) is therefore built around a simple dichotomy: the withdrawal agreement is either in force or it is not. If the agreement cannot be said to be in force on the second anniversary of the article 50 notice, departure occurs automatically (absent unanimous agreement to the contrary between the UK and the EU's member states). If, therefore, the agreement's entry into force is subject to the fulfilment of conditions or is postponed for other reasons beyond the two year period, the UK will still leave the EU on expiry of the two-year period.

The converse of this is arguably that the entry into force of a withdrawal agreement can only accelerate the UK's departure from the EU (unless the agreement comes into force on the second anniversary of the article 50 notice). The agreement itself cannot, once in force, delay departure beyond the two year cut-off date. Departure will already have happened because article 50(3) indicates that departure is synonymous with entry into force of the withdrawal agreement.

The principal argument against this rigid conclusion is that "failing that" refers not to the entry into force of the withdrawal agreement but to conclusion of the withdrawal agreement. This does not seem to be what the English version of article 50(3) says, though some other language versions (eg Italian) offer support for this argument. A purposive approach to article 50(3) might enable the sensible conclusion to be reached that a withdrawal agreement that enters into force within the two years is intended to provide the EU and its departing member with maximum flexibility over the withdrawal, including as to the date of departure, in order to smooth the process on both sides. The two year cut-off is, perhaps, only a protection for the departing state to ensure that the negotiation process cannot be dragged out interminably.

However, even if article 50(3) does enshrine an inflexible approach to the date of withdrawal, it may be possible to circumvent this inflexibility,

at least in part. The withdrawal agreement, once in force, could provide that certain rights or obligations arising from EU membership should continue to apply to the UK or in the UK for a transitional period. If so, these rights and obligations would not apply because the UK was a member of the EU but because the withdrawal agreement provided that they should apply (though departure on these terms may have implications for arrangements between the EU, the UK and third states). This may beg the question of what can be included in a withdrawal agreement made by the EU. All article 50(2) says is that the withdrawal agreement should "set... out arrangements for [the UK's] withdrawal, taking account of the framework for its future relationship with the Union". The continued application, for a transitional period (though not permanently), of some EU rights and obligations would seem to fall squarely within the arrangements for the UK's withdrawal.

If specific EU rights and obligations were to continue to apply within the UK after the UK's departure from the EU, it would probably require primary legislation to achieve that end. The Government could, perhaps, seek to designate the withdrawal agreement as an EU treaty under section 1(3) of the European Communities Act 1972 (though this would require the approval of both Houses of Parliament) and contend that the withdrawal agreement had direct effect in UK law under section 2(1) of that Act (see below). This might have political consequences as well as being of debateable legal validity. In any event, for reasons discussed further below, the European Communities Act 1972 will in practice require amendment or supplementation for the UK to leave the EU, which will bring the matter back into the political arena.

The timing of withdrawal legislation

The outcome of *Miller* could mean that the Government requires legislation before it is able to give notice under article 50 of the UK's decision to withdraw from the EU. Even if the Government prevails in that litigation, for the reasons given above the Government could be faced by further litigation over what is necessary as a matter of UK constitutional law in order for the UK to ratify the withdrawal agreement, with the real risk that this litigation would take place tight against the two year period in article 50(3) of the TEU.

In these circumstances, there is much to be said for the Government seeking to secure the passage of legislation in the near future setting out the legal structure for the UK's departure from the EU. This legislation could both draw the sting of the October court cases (though it would not in practice be possible for legislation to be passed before the first instance hearing of *Miller*), as well as disapplying the Constitutional Reform and Governance Act 2010 and the European Union Act 2011 from any withdrawal agreement and any agreement(s) as to the UK's future relationship with the EU. The EU has specific procedures to address a member state's decision to leave the EU (though they were probably drafted in the confident expectation that they would never be used and, therefore, without the attention they might otherwise have received). The UK also needs specific legislation addressing its departure rather than being forced into the application of uncertain and, in some respects, unsatisfactory, laws aimed at other situations.

There may also be political advantages for the Government in legislating relatively quickly. MPs and peers may now, so soon after the referendum, feel wary of being perceived to disregard the will of the people as expressed in the referendum. As one Oxford academic put it, "in a context where many people voted Leave precisely

because they felt disenfranchised, actually to disenfranchise them by failing to follow the result of the referendum has the potential to be particularly illegitimate..." But the greater the distance in time from the referendum, the clearer the alternative arrangements and, perhaps, the worse the economic indicators, the bolder that legislators may feel in suggesting that the UK electorate might want to look again at its decision of 23 June 2016.

This is not to say, of course, that Parliament should be prevented from considering the terms of any withdrawal agreement if and when it is agreed. Parliament is unlikely to want to surrender to the executive exclusive control over the arrangements for withdrawal, nor can that have been the intention of the 51.9% of the electorate that voted for Brexit. But the existing legislation is uncertain in its application and was never intended to address an issue as constitutionally, economically and politically significant as the UK's departure from the EU. It would be appropriate for Parliament to lay out now a specific framework for this unprecedented situation, including provision allowing Parliament a decisive say over the withdrawal agreement and any agreement(s) setting out the UK's continuing relations with the EU. The scope, nature and timing of what Parliament is asked to do may affect the politics and the outcome.

The needs of UK law on departure from the EU

There is another reason why legislation dealing comprehensively with the mechanics of the UK's departure from the EU may be preferable sooner rather than later. This is to establish the framework for adapting UK law to the post-EU world and, in the light of that, to enable the huge amount of work that this will entail to begin in order to ensure that the UK is ready for departure, whenever departure may occur.

EU law operates in two principal ways (article 288 of the TFEU). First, through directives, which specify a result that must be achieved but which leave to member states the choice of form and method. Directives must therefore be implemented by each member state in its domestic law. Secondly, by regulations, which are binding on, and directly applicable in, each member state. No domestic implementation of regulations is required or, indeed, permitted.

The European Communities Act 1972 provides that all "rights, powers, liabilities, obligations and restrictions from time to time created or arising under the [EU's] Treaties... as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly" (section 2(1)). This gives direct effect in UK law to the EU's treaties and also to EU regulations. Section 2(2) goes on that the Government may use secondary legislation to implement in UK law rights and obligations that EU law requires to be implemented. Secondary legislation can therefore be used to implement the requirements of an EU directive, though primary legislation can, and sometimes is, also used for this purpose.

When article 50(3) of the TEU bites, whether because a withdrawal agreement has come into force or because two years has passed since the UK's withdrawal notice, the EU's treaties and its regulations will cease to apply to the UK. Article 50(3) says expressly that the EU's treaties "shall cease to apply to the state in question" on its departure, with the result that there will then be no rights or obligations under the EU's treaties that "are without further enactment to be given legal effect" in the United Kingdom under section 2(1). Directly applicable EU laws (including the EU's treaties themselves) will therefore automatically

disappear from UK law whether or not the European Communities Act 1972 is repealed. The same is not necessarily true of secondary legislation made under section 2(2), which will continue in force notwithstanding the UK's departure from the EU provided that the 1972 Act is not repealed. The political reality, however, is that the European Communities Act 1972 will be repealed on the UK's departure from the EU, even if only for symbolic reasons, and further legislation will also be required.

The disappearance from UK law of EU regulations would create a number of holes in UK law. Even though some or all of the EU's directives as implemented in UK law could, legally, continue in force, they may also run into problems. These potential holes and other problems would affect, for example, constitutional, administrative and regulatory law, but not all English law. In particular, they would not affect the law applicable to commercial transactions (principally contract, tort and trusts law) because this is largely untouched by EU law. What the UK should do about the areas of UK law that are affected or determined by EU law needs to be decided soon because putting in place the necessary revisions is a major undertaking and cannot be left to the last minute.

The most straightforward way to address this problem would be to pass legislation that continued in force all EU and EU-derived law that was in force immediately before the UK left the EU. This would work satisfactorily, without any need for change in the law, as regards EU law that only lays down rules or standards, whether as to bank capital requirements, water quality, consumer protection or anything else. Rules and standards of this sort do not depend upon continuing EU membership. Even if the UK had never been a member of the EU, the UK would in the majority of cases still have had its own rules covering the same area. For continuity, simplicity and, overwhelmingly, for practical reasons, the UK should initially continue to apply the same rules. Once outside the EU, the UK could, of course, revisit all these laws when the need arises and legislative capacity allows, but it would be imprudent to try to do so when the UK will already have its hands full in adapting laws that do require change. Reviewing laws that do not actually need changing before departure would be an unnecessary distraction.

A considerable volume of EU law applicable in the UK goes beyond rules and standards. For example, EU law provides for: budgetary contributions, elections, the appointment of judges to the CJEU and other institutional and inter-governmental matters; money, both contributions to the EU and money coming from the EU; mutual recognition of measures, steps, decisions, judgments and qualifications from other EU member states; and powers and discretions given to EU institutions or other bodies. These aspects of EU law cannot continue in the UK as they are after the UK has withdrawn from the EU. They need to be changed to meet the UK's requirements outside the UK, and the work to achieve this needs to be done so that the revised forms of these laws can come into force on the day of departure.

So, for example, if EU law gives a discretion to a particular EU body, the UK will need to decide on which UK body that discretion should be conferred, which might involve creating a new body. If mutual recognition is involved (and has not been resolved in the arrangements for the UK's continuing relations with the EU), the UK will need to decide whether to continue to recognise the relevant measures from EU member states even if they will not recognise the UK's measures. One-sided recognition might, for example, disadvantage UK businesses, as well as potentially posing issues for the UK under the most favoured nation provisions in the World Trade Organisation's principal agreements, GATT and

GATS. The UK will need to decide whether recognition is to be afforded in these circumstances and, if so, what procedures should be put in place to ensure, if appropriate, equivalence following the UK's withdrawal from the EU.

The entire UK statute book needs to be reviewed to the extent that it falls within the EU's competence in order to identify those aspects of EU and EU-derived law currently in force in the UK that must be adapted for life outside the EU and those that can, at least in the short to medium term, continue in their current form. Those that can continue unchanged should be put to one side for the time being. The necessary changes must then be made to the remainder so that the changes can come into force on departure. This is not something that can be left until after departure because that would create too much uncertainty. Nor can it be done by attempting to lay down broad and general principles that do not address the details because that again would only lead to uncertainty and confusion. It cannot even be left to a commission of the great and the good to sort out as they see fit because it may involve difficult policy decisions that Government and, potentially, legislators will need to consider. The only practical way is a line by line assessment of laws in force under the European Communities Act 1972 or otherwise derived from EU law. Each Government department will presumably take charge of legislation within its area of responsibility, but in order to do this work it needs to know what the framework for revision is, including what changes can or should be made and how.

The volume of the review and revision work required means that any changes to the law cannot realistically be undertaken through primary legislation because that would be too time-consuming. The legislation providing for the continuity of EU law will therefore need to echo the European Communities Act 1972 in allowing the Government to amend any EU or EU-derived law otherwise in force in the UK through secondary legislation that can be brought into force on the day the UK leaves the EU.

This will pass wide law-making powers to the executive. Parliament will want to circumscribe and control those powers. So, for example, the power to make changes might be confined to such changes as are reasonably necessary to address the fact that the UK will no longer be a member of the EU pending a proper, evidence-based, review of the relevant laws after the UK has left the EU.

The key point for the UK now is that those charged with carrying out the task, which needs to start as soon as possible, need to know the scope of what they are looking for and what they can and cannot do in order to carry out the work efficiently. For that purpose, the framework for the work needs to be laid down in the near future. The work cannot be done in a rush leading up to the day of the UK's departure from the EU, still less afterwards. Revisions in this work are bound to be necessary as work and negotiations with the EU progress, but it remains necessary to start the process soon in order to have a real hope of completing it in time.

Conclusion

The constitutional uncertainties within the UK, as well as the scope of the work necessary to prepare for the UK's departure from the EU, mean that the framework for effecting withdrawal should ideally be laid down in the near future. To achieve this, the Government should put before Parliament in the near future proposals as to how departure will, from the legal point of view, be achieved. Two years might seem like a long time, but the work involved is huge. What is to be done and how it is to be done needs to be prescribed sooner rather than later.

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