



BREXIT: THE WHITE PAPER ON THE GREAT REPEAL BILL

The UK Government's White Paper on its forthcoming Great Repeal Bill offers a few high level indications as to the Government's plans for the Bill, but the detail, which could prove controversial, must await the publication of the Bill itself. The Bill is due to be introduced into Parliament at the start of its next session, likely to be in May 2017.

The UK Government made clear some time ago its intention to introduce into Parliament a "Great Repeal Bill". This legislation will repeal the European Communities Act 1972, preserve in UK law most EU law as it stands on the day of the UK's withdrawal from the EU, and enable changes to be made to EU-derived law by secondary legislation in order to ensure that it continues to function sensibly after Brexit (see our briefing entitled *Brexit: what will the Great Repeal Bill do?*, which discusses the position in greater detail).

The Government has now published a White Paper entitled *Legislating for the United Kingdom's withdrawal from the European Union* explaining its intentions with regard to the Great Repeal Bill. The explanations in the White Paper do not, however, expand greatly on the Government's previous statements. In particular, the White Paper discusses the need for the Government to be able to use secondary legislation to "rectify problems occurring as a consequence of leaving the EU", but offers few clues on how any limitations on the use of secondary legislation will be framed. The extent of the powers the Bill will give the Government may prove controversial when the Bill is presented to Parliament, which will be "at the start of the next parliamentary session". The date for the opening of the next session of Parliament has yet to be fixed, but it is likely to be in May 2017.

With regard to the content of statutory instruments to be made under the Great Repeal Bill, the White Paper accepts that these will involve policy changes consequent upon withdrawal from the EU, but does not say how new policies will be developed or whether there will be consultation with those potentially affected by the changes. It looks, therefore, as though those who could be affected need themselves to identify the issues and ensure that the Government is aware of them.

Points made in the White Paper include the following:

- The need to transpose EU law as it exists on the day on which the UK leaves the EU arises from the need to ensure a "stable and smooth transition" and a "smooth and orderly exit", and to ensure clarity and certainty in people's rights and obligations.
- EU law will not be "copied-out" into UK law regulation by regulation. Instead, it will be incorporated by reference to EU in force on the day of the UK's departure, but subject to any amendments then made by UK law.
- The Great Repeal Bill will not aim to make "major changes to policy or establish new legal frameworks beyond those which are necessary to ensure that the law continues to function properly from day one". Major

KEY ISSUES

- Transposing EU law into UK domestic law will entail a huge amount of work
- The UK's White Paper adds little to its previous statements as to how this will be done
- The work will involve numerous policy choices consequential on withdrawal from the EU
- The White Paper does not say whether there will be any consultation on these policy choices

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policy initiatives will be brought about by primary legislation, which will include a customs bill and an immigration bill.

- Rights under the EU's treaties that can be relied on directly in court by an individual will continue to be available in UK law, but much else in the treaties themselves will not be moved into UK law because it will be unnecessary post-Brexit (eg institutional arrangements).
- EU-derived law will continue to be interpreted in accordance with CJEU judgments given before Brexit. These judgments will have the same status as judgments of the UK Supreme Court, which can overturn its earlier decisions, though it rarely does so in practice. The White Paper adds that the Government is examining "whether it might be desirable for any additional steps to be taken to give further clarity about the circumstances in which such a departure [from a prior CJEU decision] might occur".
- The EU's Charter of Fundamental Rights will not be transposed into UK law, though the Government's intention is that this will not affect substantive rights that individuals already benefit from in the UK. Other instruments, such as the European Convention on Human Rights (which is not an EU treaty), contain many of the rights also found in the Charter.
- A very significant proportion of EU-derived law will not, on conversion into UK law, achieve its purpose or will no longer work. As a result, secondary legislation will be required to ensure that this law can be made to work. Secondary legislation will be required: for matters that might be affected by the negotiations between the UK and the EU and that will not, therefore, be known when the Bill is before Parliament; for "adjustments to policy that are directly consequential on our exiting the EU"; and to provide a level of detail not thought appropriate for primate legislation. Secondary legislation will be able to amend prior primary legislation (ie the Great Repeal Bill will include a "Henry VIII clause").
- Examples of where secondary legislation is likely to be required identified in the White Paper include where EU-derived law will be entirely unable to operate because the UK has left the EU, where it will cease to operate as intended or where it will be redundant. The White Paper also refers to EU law that involves reciprocity between EU member states, commenting that "it may not be in the national interest, or workable, to continue to operate those arrangements alone".
- The White Paper says that the power to use secondary legislation to amend EU-derived law will not be available "to make a policy change which is not designed to deal with deficiencies in preserved EU-derived law arising out of our exit from the EU".
- The White Paper estimates that "the necessary corrections to the law will require between 800 and 1,000 statutory instruments", or about the same number of statutory instruments as are now made in a single year.
- Both normal means of enacting statutory instruments will be used, ie the negative and affirmative procedures. Under these procedures, statutory instruments take effect, respectively, unless Parliament votes against them or only when Parliament votes to approve them. The White Paper gives no indication as to who will choose the procedure or on what basis.

- The power to amend the law by statutory instrument given by the Great Repeal Bill will include a "sunset" clause, ensuring that the power is "appropriately time-limited". The White Paper does not say what period might be "appropriate", but most of the work must be done prior to departure.
- The Great Repeal Bill will include power to make legal changes required by any withdrawal agreement between the UK and the EU, though the White Paper stresses that the Government will seek the approval of both Houses of Parliament to any final agreement with the EU before it is concluded. The Government also concedes that any new treaty with the EU will require the approval of Parliament in accordance with the Constitutional Reform and Governance Act 2010.
- Within the UK, the aim is to ensure that "the effective functioning of the UK single market is maintained" and that there are "no new barriers to living and doing business within our own Union". The Government "intends to replicate the current frameworks provided by EU rules through UK legislation" but to discuss with the devolved administrations in the UK to identify where common frameworks need to be retained for the future and where that is not necessary. It is not clear what this means (intra-UK state aid rules?) but the Government comments that it is likely to involve a significant increase in the decision making power of each devolved administration. The devolved legislatures will be given the same powers as the UK Parliament to amend legislation that they have passed to implement EU law and that will no longer operate appropriately after Brexit.

In general terms, there is little new in the White Paper. The extent of the power to use secondary legislation to amend EU-derived law will be wide, but the precise constraints to which the power will be subject remain unclear. Secondary legislation will not be used to make policy that is not directly consequential on Brexit, but policy decisions that are consequential on Brexit will, it seems, fall to the Government and not to Parliament. A large number of policy decisions consequential on Brexit will have to be made, and those likely to be affected need to identify the issues and to talk to the Government about them.

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