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BREXIT:
WHAT WILL THE GREAT REPEAL BILL DO?

— THOUGHT LEADERSHIP

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BREXIT

What will the Great Repeal Bill do?

Executive summary

- The Great Repeal Bill will, according to the UK Government, preserve EU law as it stands at the moment before the UK leaves the EU and allow changes to be made by secondary legislation in order to ensure that it functions sensibly.
- Though apparently straightforward, the volume and complexity of EU law makes this domestication of EU law a complicated task.
- The task involves more than the application of a blue pencil to minor elements of EU legislation in order to excise a few words here and there or to substitute UK institutions for EU ones. It will entail immediate policy choices as to what EU law should continue to apply in post-Brexit Britain and, if it should, how it needs to be changed in order to work effectively.
- Reciprocity is at the heart of much EU law, and will raise major issues regarding its continued application.
- The policy choices required will be affected by the UK's continuing relationship with the EU and by any transitional arrangements.
- This work cannot be left to civil servants, however able, in isolated Whitehall basements. The Government needs to consult those who are directly affected by EU law as to which parts of this law need domesticating and how this can most effectively be done.
- More significantly, those directly affected by EU law need urgently to identify the parts of the EU's acquis that concern them most, consider whether those parts should continue to apply once the UK has left the EU and, if so, how they can best be adapted to the UK's new circumstances. The Government will need guidance in deciding what to keep and how to do it.

The scale of the task

The EU is an organisation created and ruled by law. The 60 years of its existence have led to the enactment of a huge volume of law. This law starts with the EU's two constitutive treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union, both of which have the force of law in member states. EU legislation made under those treaties similarly has legal effect in member states. This legislation comes in two principal forms. First, regulations, which are directly applicable in all member states without need for national implementation. Secondly, directives, which are binding as to the result to be achieved but which leave to member states the form and method of implementation. In addition, regulations or directives may delegate law-making power to EU institutions, and certain decisions by the EU (eg as to its budget) are also binding on member states. The House of Commons Library has calculated that, at the beginning of 2017, there were 899 Directives and 5,155 Regulations amongst a total of almost 19,000 EU legislative acts currently in force.

EU law generally takes effect in the UK because the European Communities Act 1972 (ECA) provides for it to do so. In particular, section 2(1) of the ECA states that:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the [EU's] Treaties, and all such remedies and procedures from time to time provided for by or under the 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(2) then allows UK delegated legislation to be enacted for the purpose of implementing, where necessary, EU law into UK domestic law. The House of Commons Library has said that around 7,900 statutory instruments implementing EU law have been made under section 2(2) of the ECA.

Even these near 27,000 legislative acts do not represent all the EU law or EU-derived law applicable in the UK. Some EU law is implemented by freestanding UK legislation. So, for example, the Seventh Company Law Directive (2006/43/EC), concerning company audits, is covered by Part 16 of the Companies Act 2006; the Takeovers Directive (sometimes called the Thirteenth Company Law Directive) was originally implemented by regulations made under section 2(2) of the ECA, but is now in Part 28 of the Companies Act 2006; much of Directive 2014/59/EU on the recovery and resolution of credit institutions is in the Banking Act 2009; and Directive 98/83/EC on the quality of water intended for human consumption is in, or in regulations made under, the Water Industry Act 1991 (in some cases regulations made in part under that Act and in part under the ECA).

In Lord Denning's much cited metaphor, EU law has flowed into the UK's estuaries and up the rivers. Indeed, the 44 years of the UK's EU membership has required a very considerable volume of EU law to flow beyond the UK's estuaries and rivers, reaching far into its tributaries, streams and brooks.

The great "repeal"

In its White Paper on *The United Kingdom's exit from and partnership with the European Union* (February 2017), the UK Government promises to introduce into Parliament a Great Repeal Bill that will do three things:

- Repeal the European Communities Act 1972
- Preserve all EU and EU-derived law as it stands immediately before the UK's departure, allowing Parliament or, as

The title "the Great Repeal Bill" nods towards the so-called Great Reform Act of 1832, which redrew Parliamentary constituencies in England and Wales, removing "rotten boroughs", and provided for a modest expansion of the electorate. The Great Reform Act's formal title was the Representation of the People Act 1832.

appropriate, the UK's devolved legislatures to decide later what to keep, amend or repeal

- Enable changes to be made by secondary legislation to preserved EU laws that would otherwise "not function sensibly" after the UK's withdrawal from the EU so that the UK's legal system "continues to function correctly"

The first of these steps – repeal of the ECA – is not strictly necessary for the UK to withdraw from the EU. The Government's three aims could be achieved by a minor amendment to the ECA. However, the symbolism involved in repeal of the ECA is something that the Government evidently regards as an important element in its being seen to implement the people's vote in the referendum of 23 June 2016. The ECA must go, as must various other pieces of primary legislation concerning the EU, such as the European Parliamentary Elections Act 2002 and European Union Act 2011.

Repeal of the ECA will mean that all directly applicable EU legislation (largely regulations) ceases to have the force of law in the UK. Similarly, it will mean that secondary legislation made under section 2(2) of the ECA to implement EU law also falls away. Hence the need for the second of the steps identified in the White Paper – the preservation of the laws that are in force by virtue of the ECA on the date of the ECA's repeal. As a matter of drafting, this preservation is straightforward (though some thought will need to be given to laws enacted by the EU before the UK's departure date but which have not by then been brought into force or become applicable). The UK has a long history of preserving laws when granting independence to former colonies and dominions (eg section 18(3) of the Indian Independence Act 1947 and section 2(1) of the Zambia Independence Act 1964).

But, like the third step (amending retained EU law to make it work), the second step disguises considerable complexity. The sheer volume of EU law makes it understandable that the Government should try to limit the scope of the task that the UK will undertake in preparation for Brexit. If a particular EU law can function sensibly in unamended form after the UK's withdrawal from the EU, the necessarily limited resources available should not be wasted on it. There will be more than enough to do in the period up to the departure date without devoting time to matters that are not absolutely essential. But there will remain many difficult issues that cannot be avoided. Not all EU-derived law will need to be retained – indeed, much can be discarded. Choices will be required on what should remain, along with choices as to what amendments to retained EU law are needed in order to ensure that it continues to work. The choices will be affected by the shape the UK's ongoing relations with the EU, including any transitional arrangements, which may not be known until late in the day. The choices will require significant policy decisions, not merely administrative corrections.

However, even before that stage is reached, Parliament must address the constitutional question of how much latitude it is prepared to give the Government to pick and choose what EU law should continue to apply in post-Brexit Britain and how that continuing EU law should be amended. This could have a significant effect on the scope and nature of underlying task.

The constitutional issue

In an ideal world, Parliament would consider in detail all EU law currently in force in the UK and then pass primary legislation to keep those parts it considers desirable for the UK after withdrawal from the EU, to amend other parts, and to remove from the statute book those parts it considers unnecessary or undesirable.

This approach is, however, unrealistic. The passage of primary legislation is a time-consuming process. The sheer volume of EU law (even leaving aside the politics it engenders) means that there is insufficient Parliamentary capacity to do all that this would require before withdrawal. Parliament has passed an average of only some 30 public Acts of

Parliament in each of the last five calendar years. An attempt over the next two years to re-write the entire gamut of EU law generated by the EU's 60 years of legislative activity would be doomed to failure.

Secondary legislation is, as the Government says, the only realistic way to achieve the domestication (or onshoring) of EU law. Its greater flexibility and speed may also allow it to be amended rapidly to meet the needs of any withdrawal agreement between the UK and the EU, including any transitional arrangements. If the UK and the EU are able to reach agreement, it might well be relatively late in the day, and certainly well after the Great Repeal Bill will have become law. Secondary legislation also offers the ability to correct quickly the errors and omissions that will inevitably occur as a result of the time pressures involved.

However, the constitutional issue with secondary legislation is that it is formulated by the Government and receives little effective Parliamentary scrutiny. The Great Repeal Bill therefore risks taking back control from Brussels only to hand it to Whitehall. This lack of real scrutiny for secondary legislation leads to the question as to what freedom the Great Repeal Bill should give the Government in formulating its secondary legislation.

At one extreme, the Government could have power to do whatever it wants provided that the area in question is already occupied by EU law, even to the extent of allowing secondary legislation to change primary legislation. (A provision allowing secondary legislation to change or repeal primary legislation is commonly referred to as a Henry VIII clause after the Statute of Proclamations of 1539 which gave that sovereign – who had earlier brought about a different kind of break with Europe – wide power to rule without reference to Parliament.) This would represent a major and, in modern times, unprecedented transfer of effective legislative power to the executive.

At the other extreme, all EU law could continue to apply in the UK, with the power to make secondary legislation limited to disapplying or amending EU law to the extent strictly necessary in order for continuing EU law to function sensibly after Brexit or for the UK's legal system to function correctly. This would closely confine the Government's legislative authority, but it would also open up the possibility of a significant number of legal challenges – is this change or that change really necessary?

There are any number of options between these extremes. For example, one suggestion made to the House of Lords Select Committee on the Constitution and recorded in its report entitled *The "Great Repeal Bill" and delegated powers* (March 2017) was that the Government could be given a wide power to make changes by secondary legislation, but with the addition of a list of things that the Government could not include in its secondary legislation. The aim of this approach would be to prevent major policy changes being slipped through under the guise of domesticating EU law.

A further possibility might be a time limit (a sunset clause) on either or both of the Government's ability to make changes through secondary legislation or as to the duration of any EU law that is retained. This would force the Government to revert to Parliament, but could lead to the inability to correct rapidly any mistakes made in the onshoring process, or a rushed legislative process to keep laws in force as the sun drops. The House of Lords Select Committee on the Constitution commented that "the Government would need to present a very strong justification for not including sunset clauses in relation to extensive powers conferred for the purpose of converting EU law into UK law".

Alternatively, Parliament could establish a new scheme to apply greater scrutiny to the delegated legislation, though less than the full legislative process, including allowing amendments (not currently permissible for secondary legislation). That may run the risk of the process being

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bogged down in a political quagmire. Major constitutional change is something that should not be done in a rush.

The problem may be that it is only really possible to define the secondary legislative powers required to smooth the path of EU withdrawal once the extent of the surgery that must be conducted on EU law is properly understood and the contents of any withdrawal agreement and transitional arrangements are known. Ideally, an audit would be undertaken of EU law in force in the UK and common issues for the onshoring process identified. Common solutions could then be defined, debated and included in primary legislation (subject to different solutions being required in special circumstances). For example, should references in EU legislation to the member states, to the European Banking Authority and to the Commission be read, respectively, as references to the UK alone, to the PRA (or Bank of England, and what about pre-existing guidelines) and to the Secretary of State? Where there is currently mutual recognition or reciprocity between EU member states, should the general approach be that the UK will only recognise measures taken in EU member states or by the EU if they also recognise comparable measures taken in the UK, or should the UK be prepared in some instances asymmetrically to recognise EU acts? Or should EU member states be regarded in all respects in the same way that states outside the EU are now regarded? But this again could result in the whole withdrawal process being delayed by the numerous different (and conflicting) visions of post-Brexit Britain.

A note on the Department for Exiting the European Union's website says that "[a]ll Government departments are currently reviewing EU laws that apply in their policy areas and how our withdrawal from the EU will affect the operation of those laws. Where laws need to be fixed, that is what the Government will do." This glosses over the fact that difficult choices will have to be made, both as to what elements of EU law are retained in UK law and what changes should be made to that law. The choices available can only be understood by a consideration of the detail of EU law.

Irrelevance

Some EU law will be irrelevant to the UK after the UK's withdrawal from the EU. The starting point is the EU's founding treaties, from which all other EU law flows. The institutional and procedural aspects of the treaties are of no continuing interest to the UK (though perhaps the UK should, in a spirit of neighbourliness, continue to recognise formally the legal personality of the EU provided by article 47 of the TEU and, if so, consider whether to accord to the EU the immunities set out in Protocol No 7 to the TFEU or to give the EU the immunities available to nation states under the State Immunity Act 1978 or those commonly afforded to international organisations under the International Organisations Act 1968). The extensive treaty provisions requiring free movement, whether of goods, services, capital or persons, are also unlikely to be of continuing application, subject to the terms of whatever withdrawal agreement or transitional arrangements the EU and the UK enter into. Much of the TEU and the TFEU can therefore be removed from the UK's book of laws when the UK leaves the EU.

But there are some parts of the treaties that are not necessarily irrelevant – though they may not be necessarily relevant either. For example, article 16(1) of the TFEU provides that everyone has the right to the protection of personal data concerning them, article 18 provides that discrimination on grounds of nationality shall be prohibited, and article 157 enshrines the principle of equal pay for male and female workers for work of equal value. These aspects may, as a matter of law, be sufficiently covered by specific UK legislation or continuing EU law such that the whole of the EU's treaties can disappear from UK law. The political symbolism behind the Great Repeal Bill may be thought to require this. But there is a choice to be made, and some may regard the repeal of these

measures as conveying an alternative, and less acceptable, symbolism.

As to subordinate legislation, it is hard to see the continuing relevance, for example, of Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations, which establishes an authority for the registration and control of European political parties. Similarly, Regulation (EU) No 952/2013 laying down the Union Customs Code (recast) will be irrelevant if, as the Government seems to intend, the UK is outside the EU's customs union. The UK will need its own customs code after Brexit (unless those economists demanding a policy of completely free trade get their way), but that is unlikely to be accomplished by importing the EU's code. Likewise Regulation (EU) No 1144/2014 on information provision and promotion measures concerning agricultural products, which provides for agricultural promotions schemes fully or partly funded by the EU, seems irrelevant (though farmers may have a different view). Not to mention Commission Regulation (EC) No 2293/2000 setting the maximum amount of compensatory aid resulting from the conversion rates for the Swedish krona and the pound sterling applicable on 1 August 2000, and Regulation (EC) No 808/2004 concerning Community statistics on the information society.

The simple point is that while the Great Repeal Bill may start by importing all EU law into UK domestic law, a substantial volume of EU law can be excluded from this process because it will have no role to play once the UK has left the EU. But someone must go through all the EU's legislation in order to decide what has relevance and what can safely be discarded, whether before or after the expiry of any transitional arrangements. Criteria are required to help the conduct of this task. It may be superficially easy but there will be some difficult choices to be made, a difficulty compounded by the extensive cross-references within EU legislative measures, particularly later ones. What may seem irrelevant on its face could be of importance to another piece of legislation that has continuing relevance to the UK.

Basic rules

In many instances the EU has laid down harmonised rules for an area over which, even if the UK had never been a member of the EU, the UK would have had rules of its own. This is the prime area where EU law can be retained. For example, in the sphere of private international law the Rome I Regulation on the law applicable to contractual obligations (593/2008/EC) is one such EU law.

The Rome I Regulation lays down the rules that the UK courts must apply if called upon to decide what law governs a contract. The Regulation applies whether the governing law turns out to be the law of an EU member state or the law of a state outside the EU. Before the Rome I Regulation came into force in 2009, the UK's rules in this area were in the Rome Convention (an independent treaty made under the aegis of the EU and given effect in UK law by the Contracts (Applicable Law) Act 1990), before which the rules were those developed by the common law (ie judge-made rules).

There is no reason why the Rome I Regulation cannot continue to apply in the UK after the UK has left the EU. Indeed, one leading academic, from Oxford University, has commented that "it is hard to believe that there is a lawyer in full possession of his or her mind who would propose taking us back to... the common law" (though another leading academic, from Cambridge University, was rather more relaxed about returning to the common law when giving evidence to the House of Lords Select Committee on the European Union). The Regulation does not depend upon reciprocity or the work of any EU institutions. It doesn't even depend upon the Regulation remaining in place in the EU. The Regulation lays down an independent and largely self-contained set of rules that the UK can – and should – continue to apply.

Even in this generally easy situation, it is still necessary to consider what amendments are required to the

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Regulation. For example, article 3(4) provides that where all other elements relevant to the situation at the time of the choice of law are located in one or more member states, the choice of the law of a non-member state cannot prejudice the application of EU law as implemented in the forum. The most obvious remedial measure would be to delete article 3(4), but this requires a decision (article 3(3) covers the position within the UK, so merely changing the references to the EU to the UK would be duplicative). The deletion of article 3(4) is not strictly necessary to make the Rome I Regulation function correctly in the post-Brexit UK – the Government has said that EU law will continue in force as domestic law – but it may be a sensible step to reflect the UK's departure from the EU. Articles 1(4), 7(3) and 23 of the Rome I Regulation also refer to EU member states, again requiring consideration, decision and, probably, amendment.

The Government's White Paper says that "the preserved law should continue to be interpreted in the same way as it is at the moment". This indicates that past decisions of the Court of Justice of the European Union on the interpretation of the Rome I Regulation will continue to be binding even though the legislation that gives CJEU decisions this effect (section 3 of the ECA) will have disappeared from the UK's statute book. As the Government says, this will provide continuity, preventing the reopening of issues already decided by the CJEU. It may be, however, that the Supreme Court – perhaps the Court of Appeal – should be able to reverse CJEU decisions in order to avoid ossification of domesticated EU law or to overturn obviously unsatisfactory rulings.

But what about future decisions of the CJEU? The White Paper is clear that the Government "will bring an end to the jurisdiction of the CJEU in the UK" and that "[UK] courts will be the final decision makers in our country". UK courts will not, it seems, be bound by future CJEU decisions. Legislation could say that UK courts must "take into account" decisions of the CJEU (the language of the Human Rights Act 1998 on the UK courts' obligation concerning decisions by the European Court of Human Rights), "have regard" to them, or adopt some other linguistic formulation that offers CJEU decisions a persuasive influence.

More likely, and, perhaps, politically more convenient, is legislative silence on this point. This would leave it to the UK courts to decide whether or not to follow a post-Brexit decision of the CJEU or whether to strike out on their own if they consider that the CJEU has taken a wrong turning. This could eventually lead to divergence between the UK and the rest of the EU in the interpretation of the Rome I Regulation and other EU-derived laws but, in the greater scheme of things, that may not be of great concern.

Other EU legislation or UK implementation of EU legislation falls into the same category as the Rome I Regulation. These include: the Rome II Regulation on the law applicable to non-contractual obligations (864/2007/EC); the Financial Collateral (No 2) Regulations 2003 (SI 2003/3226 passed under section 2(2) of the ECA to implement the EU's Directive, 2002/47/EC, on financial collateral arrangements); those parts of the Consumer Rights Act 2015 that now implement the EU directive, 93/13/EEC, on unfair terms in consumer contracts; Regulation (EC) No 1523/2007 banning the placing on the market and the import or export of cat and dog fur; and Council Regulation (EU) No 692/2014 concerning restrictive measures in response to the illegal annexation of Crimea and Sevastapol (ie, with other regulations, sanctions on Russia). But in each case, it is necessary to go through the enactment carefully to identify any elements that will require amendment in order for them to operate sensibly in a UK outside the EU. They are, for example, replete with mentions of the member states and the European Union, which may require change to refer to the UK or merely deletion.

A review of any piece of existing EU legislation will give rise to tempting ideas as to how it could be improved. For

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example, the Financial Collateral (No 2) Regulations is a valuable piece of legislation, but the confines of the directive it implements has left it with uncertainties and ambiguities. It could, and eventually should, be clarified and improved. However, reform of this item of legislation is probably one of those items that shortage of time requires be left until after the UK has withdrawn from the EU. The Regulations work now, even if not perfectly, and the limited resources available should probably be devoted to other laws where change is actually necessary in preparation for the UK's withdrawal from the EU. But it is hard to believe that the Government will not be faced by a deluge of lobbyists demanding this tweak here or that change there.

Reciprocity

Reciprocity in its various forms is of the essence of the EU and, as a result, infuses much EU law. It is an area that will require significant decisions as to what is appropriate for the UK after it leaves the EU, though any decision will be affected by the terms of the withdrawal agreement, if any, between the UK and the EU, of any transitional arrangements and of any agreement as to future trading and other relations. The EU's Regulation on insolvency proceedings (recast) (the EUIR, 2015/848/EU, most of which applies from 26 June 2017, replacing Regulation 1346/2000/EC) illustrates two kinds of reciprocity.

Assuming that no agreement is reached between the EU and the UK as to the continued application of the EUIR or of a substitute arrangement, the starting point will be a decision as to whether the UK should keep the EUIR at all. The UK already has the Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which implement the UNCITRAL Model Law on Cross-Border Insolvency and have no geographical limitations, nor are they based on reciprocity. If the overall policy decision is that EU member states should, as a general rule, be aligned with other foreign countries (eg the US, Australia and India), disapplying the EUIR in post-Brexit Britain could be the natural step. However, unlike the EUIR, the Model Law does not allow insolvency proceedings taking place elsewhere to be automatically recognised in the UK. A formal application to the court is required, which will necessarily cost more in time and money to achieve what the EUIR does without cost. Some may therefore argue that, where it can work, the EUIR should remain in place.

The EUIR starts by defining the jurisdiction of the member states' courts with regard to insolvency proceedings and the law applicable to those proceedings (main insolvency proceedings only if the centre of main interests of the relevant company is in the member state in question), before going on to certain important exceptions to the applicable law, such as in relation to employment contracts, security rights, set-off, immoveable property and payment systems. These could, with minor adaption, be applied to the UK alone or the UK could even take the opportunity to broaden its jurisdiction beyond the limits currently imposed by the EUIR. For example, if the EUIR ceased to apply, the English court could adopt the lower threshold of there being "sufficient connection" with England to justify insolvency proceedings. This test is currently applied, for example, to schemes of arrangement. It does not depend upon the debtor's centre of main interests but could be met where creditors or assets were present in England or debts governed by English law.

If the English courts were to use this lower threshold, however, there would be a risk that those English proceedings would not be recognised in EU member states. This is because the EUIR addresses more complex issues. It provides that where a court in a member state has decided that it has jurisdiction over a particular insolvency because the company's centre of main interests is within its territory, all other EU member state courts should automatically recognise that decision and defer to it (articles 19 and 20). In some high profile cases (eg Nortel and MG Rover), the English court has been able to exercise insolvency jurisdiction in accordance with

the EUIR over entities incorporated elsewhere within the EU on the basis that each company in the group had its centre of main interests in the UK. The English insolvency proceedings in relation to those European group companies were then automatically recognised throughout Europe. Without any such reciprocal arrangements, UK proceedings could not be exported in this way and English insolvency officeholders would need to apply separately to local courts in each member state where recognition is required for such proceedings to be effective. As mentioned previously, this would necessitate additional time and costs being borne by insolvent estates. It may also reduce the ability for groups of companies operating in different jurisdictions to be able to propose a group solution. From June this year, the EUIR includes a group co-ordination procedure, and promotes enhanced co-operation between EU member states practitioners and courts. If the UK no longer benefits from the EUIR, it may be considered that the UK is no longer a favourable or competitive jurisdiction for insolvency proceedings.

Similarly, judgments given in the course of the insolvency are to be enforced throughout the EU (article 32). The UK could, in unilateral pursuit of the goal of universal insolvency, decide that UK courts should recognise and defer to decisions by courts in EU member states even though (absent specific agreement between the EU and UK or local laws to this effect in a particular member state) EU member state courts would no longer be obliged to recognise a decision by a UK court. Alternatively, and perhaps more plausibly, the UK could decide that this asymmetry, or lack of reciprocity, was unacceptable.

The EUIR also requires member states to establish insolvency registers (article 24), which the UK can do on its own (indeed, the UK should have done so by the time of departure), but the Regulation demands that these registers be connected through the European e-Justice Portal, paid for from the EU's budget (articles 25 and 26). Unless the UK and the EU reach agreement on this (likely to require a contribution by the UK to the costs), the UK's register will not be linked in this way. The Regulation goes on to require co-operation between insolvency practitioners and courts in member states (eg articles 41 to 43 and 56ff), which again the UK cannot achieve unilaterally. There are, therefore, decisions that must be taken as to how far the UK is prepared to offer one-sided reciprocity to the EU and the excisions that must be made where reciprocity is necessarily bilateral.

The position on bilateral reciprocity is perhaps even more stark with regard, for example, to cross-border mergers carried out under the EU's Directive on cross-border mergers of limited liability companies (2005/56/EC, implemented in the UK by the Companies (Cross-Border Mergers) Regulations 2007, SI 2007/2974) and insurance business transfer schemes under, inter alia, the EU's Acquisitions Directive (2007/44/EC, covered by Part VII of the Financial Services and Markets Act 2000). For these mergers or transfers to take place, it is often necessary for authorities in two EU jurisdictions to take steps (eg a certificate from the regulator in the jurisdiction of the transferee of insurance business for the UK court if the UK court is approving the transfer for the transferor). In any event, the consequences of merger or transfer must be given effect in both jurisdictions (eg assets and liabilities of companies in different jurisdictions transferred to the new company, the members of the merging companies becoming members of the new company, and both merging companies ceasing to exist in their separate jurisdictions, all in accordance with article 11(2) of the Directive on cross-border mergers).

The UK cannot give effect to these cross-border transactions on its own. Although these measures will, as a result, probably have to be lost on the UK's departure from the EU, careful scrutiny is still required in order to assess whether some useful aspects can still sensibly be retained.

Organisational issues

The EU's Regulation on prudential requirements for credit institutions (the CRR, 575/2013/EU) illustrates different complications. It lays down, over 337 pages, the EU's capital requirements for banks (though, since the CRR is a minimum harmonisation measure, the EU's member states can impose stricter requirements: article 3).

The UK will need capital requirements for banks after the UK has left the EU, and there should be continuity in those requirements. Domesticating the CRR therefore makes sense. The first question, however, is how the CRR should be brought into UK law. The UK has rules, consistent with the CRR, on capital requirements. These rules are largely in the PRA Rulebook. This begs the question of whether the CRR should be continued in UK law as part of the PRA Rulebook, and therefore subject to change in the same way as the remaining PRA rules, or as primary legislation under the Great Repeal Act.

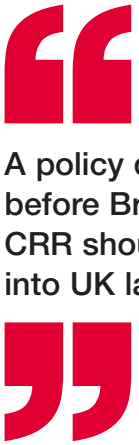
Transplanting the CRR directly into the PRA Rulebook would offer greater coherence in financial regulation, as well as allowing agility in updating the rules as circumstances demand. The Government's aim of allowing Parliament to consider, after Brexit, every piece of EU and EU-derived legislation is constitutionally laudable but it will take many years, even decades, to accomplish because Parliamentary capacity is so limited. This could lead to much UK law being frozen, unable to adapt to changing circumstances, something that might be avoided to the extent that continuing EU law can be moved into the location of existing UK regulation. Again, a policy decision is required before Brexit as to how the CRR should be implemented into UK law.

As to the substance of the CRR, in various places the CRR requires action by the European Banking Authority and the European Commission (eg the EBA must develop regulatory standards under articles 18(7), 25(4) and 143(5), which may then be adopted by the Commission as delegated legislation). In total, the word Commission appears 334 times in the CRR, and there are 387 references to the EBA, 234 references to the member states and a mere 26 references to the ESRB. Each of these references needs to be considered, as well as the measures already taken by the various EU institutions upon which powers are conferred. Should the UK continue to apply these measures, perhaps in the pursuit of equivalence, and, if so, what legislative status they should have, or should power simply be transferred to the PRA, HM Treasury or another body established for the purpose to make new rules, perhaps initially based on the EBA's current rules?

Another example of complexity relates to risk weightings. Under the CRR, exposures to central governments and central banks generally carry a risk-weighting of 100%, subject, for example, to a different assessment by an EU-approved credit reference agency (articles 114(1) and (2) and 135), but exposures to member states' central governments and central banks in their own currencies carry a risk weighting of 0% (articles 114(3) and (4)). Should the CRR, when enacted into UK law, continue to treat member states in the same way or should it treat them in the way that non-member states are currently treated? What about credit reference agencies (largely regulated by ESMA under Regulation (EC) No 1060/2009 on credit reference agencies)?

A taxing issue

Where a piece of otherwise relevant EU legislation refers to the member states, those references could, as a general rule, be treated as referring to the UK alone. The universal application of this approach will, however, have financial consequences, including for the UK Treasury. An example is in relation to VAT, which is, to a significant extent, harmonised within the EU, now under Directive 2006/112/EC on the common system of value added tax, which recast legislation going back to 1967. EU requirements as to VAT have been implemented in the UK largely by the



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With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Value Added Tax Act 1994 and regulations made under that Act.

One consequence of this harmonisation is that the EU is regarded as a single VAT area. This means that the VAT treatment of a transaction between a UK party and a party elsewhere in the EU is the same as the treatment of a transaction between two parties in the UK, but it is not the same as the treatment of a transaction between a UK party and a party outside the EU. This difference could have an effect on the UK's tax revenues after the UK leaves the EU. By way of example, a UK bank making a loan to a customer in the UK or elsewhere within EU is exempt from VAT on any arrangement fee it charges the customer and on the interest it is paid. The consequence of the exemption of this supply from the scope of VAT is that the bank cannot recover its input VAT in relation to the transaction (eg VAT charged by the bank's lawyers on their fees). It has been estimated that, in 2014, irrecoverable VAT cost the UK banking sector in the region of £4 and £4.5 billion.

If, however, the transaction is with a customer outside the EU, article 169(c) of the EU Directive requires that the bank be able to recover the input VAT, a requirement implemented in the UK by article 3(a) of The Value Added Tax (Input Tax) (Specified Supplies) Order 1999, which was made under section 26(2)(c) of the Value Added Tax Act 1994. It is not necessary for the Great Repeal Bill to domesticate this Order since it was not made under the ECA but under general powers conferred by the 1994 Act which were then exercised in the manner required by EU law. The reference to the EU's member states means, however, that the Order must be considered as part of the domestication of EU law. A logical approach would be to replace the reference to the EU's member states with a reference to the UK alone. UK banks could then recover input VAT in relation to transactions with parties in the EU in the same way that they can for parties in the rest of the world. If a quarter of UK -banks' irrecoverable VAT relates to transactions with parties elsewhere in the EU, that would cost the UK Government some £1 billion, assuming that business with the continuing EU remains at the same levels.

The Government must take a policy decision on whether it is prepared to forego this revenue but, in doing so, it must take into account the most favoured nation (MFN) principle in article II of the WTO's General Agreement on Trade in Services (GATS). The exemption from MFN relevant to the EU will no longer apply to the UK. Maintaining special treatment for EU customers of UK banks will impose an extra cost on banks dealing with those customers, potentially to the disadvantage of those customers. Indeed, the UK must consider in relation to onshoring as a whole whether any proposed step will be affected by WTO rules or other international obligations, such as under bilateral investment treaties, to which the UK is subject.

Another, if somewhat surreal, example of a policy decision in the tax field necessitated by the UK's withdrawal from the EU arises in relation to stamp duty reserve tax. Sections 93 and 96 of the Finance Act 1986 impose (subject to exceptions) SDRT, at 1.5%, on shares issued or transferred to a company providing clearance services or whose business is issuing depositary receipts. In *HSBC Holdings plc v HMRC* (Case C-569/07), the CJEU decided that this charge to SDRT was inconsistent with Directive 69/335/EEC concerning indirect taxes on the raising of capital because article 11(a) prohibits (again, subject to exceptions) taxation on the creation or issue of shares. The CJEU decided that SDRT was a tax on the issue of shares, not on their transfer.

This decision, coupled with the primacy of EU law over UK legislation set out in section 2(4) of the ECA, means that HMRC cannot collect the SDRT due under the Act on the issue of shares to a clearing house – indeed, HMRC was obliged to repay with interest all the tax it had collected in breach of EU law prior to the CJEU's decision. Somewhat curiously, however, sections 93 and 96 of the

Finance Act 1986 remain on the statute book in unamended form, presumably because they have a continuing, if more limited, application. HMRC has merely said that it "will not seek to collect" the 1.5% SDRT to the extent incompatible with EU law.

On departure from the EU, the UK must make a decision as to whether the preservation of EU law in force at the time of departure extends to continuing to give EU law precedence over UK legislation that would otherwise apply. Presumably EU law will have this continuing effect, in which case the UK must consider specifically whether to retain laws required to comply with Directive 69/335/EEC or to restore the position it hoped to be in when it passed the 1986 Act, albeit without appreciating the breach of EU law.

Conclusion

On 10 October 2016, the Secretary of State for Exiting the European Union said that "we will take a simple approach. EU law will be transposed into domestic law, wherever practical, on exit day". Along similar lines, the House of Lords Select Committee on the Constitution sought to draw a distinction between "the initial preservation of EU law by converting it into UK law with such amendments as are necessary to make it work sensibly in a UK context" and "a longer-term process in which Parliament and the Government determine the extent to which (what was) EU law will remain part of UK law."
The former, the Committee suggested, was a "mechanical act", the latter a "discretionary process".

This note only scratches the surface of the innumerable issues that will arise in relation to transposition, but what is and what is not "practical" in the first stage will involve major decisions that go far beyond normal administrative activity and are neither simple nor obvious. The initial stage is certainly not confined to mechanical operations.

In carrying out its difficult task, the Government will need help.
The Government will do its best, but the Government and its civil servants cannot know (and, equally, cannot be blamed for not knowing) how all the EU's laws affect UK businesses in practice. Those who are directly affected by particular pieces of EU legislation need to look at that legislation to try to establish what can and should be transposed, and how, and what can and should be left behind. It is not practicable in the next two years to undertake a substantive review of all EU legislation – if a piece of legislation will work after Brexit, leave it alone for the time being – but ensuring workability is a major undertaking in itself.

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