

## **BREXIT AND THE ROLE OF THE EUROPEAN UNION (WITHDRAWAL AGREEMENT) BILL**

Following the news that a revised Brexit deal had been agreed between the UK and the EU, the long-awaited European Union (Withdrawal Agreement) Bill (the WAB) was published by the UK Government on 21 October 2019. For Brexit, the WAB is an essential piece of UK legislation, providing the means by which the UK Government can give effect in domestic law to the Withdrawal Agreement. While the bill has progressed through initial legislative stages, MPs balked at the Prime Minister's proposal to pass the complex 110-page bill at breakneck speed, and its progression through Parliament has now been put on hold amid talks of Brexit delay.

### **BACKGROUND TO THE WAB**

Section 13 of the European Union (Withdrawal) Act 2018 (the 2018 Withdrawal Act) requires two significant steps before the Government can ratify the Withdrawal Agreement: the passing by the House of Commons of a motion (the so-called "meaningful vote") approving the Withdrawal Agreement and the accompanying the framework for the future relationship between the UK and the EU (the "Political Declaration"); and an Act of Parliament implementing the Withdrawal Agreement in domestic UK law.

Former Prime Minister Theresa May failed on three occasions to persuade the House of Commons to pass the meaningful vote for her Withdrawal Agreement and Political Declaration, and never reached the stage of publishing a WAB.

Following Prime Minister Boris Johnson's renegotiation of the Withdrawal Agreement and Political Declaration, a meaningful vote on his deal was held on Saturday 19 October 2019. This again failed to secure the House of Commons' approval, the House instead deciding to withhold approval until after the implementing legislation had been passed. As a result, on 21 October 2019 the bill to implement the Withdrawal Agreement - the WAB - was published, and passed its second reading (approval in principle) in the House of Commons on 22 October 2019. The WAB will, if passed, repeal the requirement in the 2018 Withdrawal Act for a meaningful vote and override the requirement to follow the procedures under the Constitutional Reform and Governance Act 2010 before ratifying the Withdrawal Agreement.

Having passed its second reading, the procedure in the House of Commons provides for a line by line consideration of the WAB, including the possibility of

amendments. On 22 October 2019, the House rejected the Government's "Programme Motion" for this procedure, which was intended to ensure that the WAB went through its remaining stages in the House of Commons by 24 October. The House decided that more than three days was required for a proper consideration of the WAB.

Assuming that the WAB is passed by the House of Commons, it must then be passed by the House of Lords before it can become law.

## **WHAT IS COVERED BY THE WAB?**

The function of the WAB is to ensure that the provisions contained in the Withdrawal Agreement are reflected at UK domestic level. For example, the WAB has extensive provisions regarding citizens' rights (including an Independent Monitoring Authority), and provides for the setting up of the institutions required by the Withdrawal Agreement. The WAB also provides for the UK to meet its financial obligations under the Withdrawal Agreement, and authorises the UK Government and devolved authorities to make secondary legislation to implement the Withdrawal Agreement.

The WAB also reflects certain commitments made in the Political Declaration. For example, the WAB contains provisions on non-regression of workers' rights following the end of the implementation period, which in principle is in line with the level playing field commitments contained in the Political Declaration ("maintain... employment standards at the current high levels provided by the existing common standards"). Under the WAB, the Government is required to report whether any new employment legislation departs from existing EU rights and on whether it intends to follow any new EU laws on employment rights. These provisions are intended to appease some Labour MPs, given Labour's campaign for a Brexit bill guaranteeing that workers' rights are not reduced after Brexit. For many other Labour MPs however, the WAB may not give Parliament enough power actively to steer workers' rights arrangements post-implementation – the WAB would not itself prevent departure from current EU law or require the implementation of any new EU employment laws.

## **WHAT WILL HAPPEN DURING THE IMPLEMENTATION PERIOD?**

The Withdrawal Agreement provides that EU laws continue to have effect in the UK during a time-limited "transition period" (called the "implementation period" in the WAB) so as to minimise disruption to EU and UK citizens and businesses while the terms of the future relationship between the UK and EU continue to be negotiated. The 2018 Withdrawal Act will repeal the European Communities Act 1972 (ECA) on exit day, but the WAB then provides that the ECA continues to have effect for the duration of the implementation period, subject to certain modifications.

Under the Withdrawal Agreement, the implementation period will run from exit day until 31 December 2020 ("IP completion day"). This is the same end date as in Prime Minister May's Withdrawal Agreement, which would have given the UK and the EU a period of 20 months to reach a formal agreement on the future relationship. The passage of time since then means that this period is now already down to 14 months – and to be shortened further by the postponement of exit day. Many MPs have already commented that this does not provide

enough time for a Free Trade Agreement (FTA) or other agreement to be made and ratified.

The UK and EU may agree a single extension to the implementation period "for up to 1 or 2 years". This extension must, however, be agreed before 1 July 2020, a full six months before the end of the period at a time when it may be difficult to tell whether an extension is really needed. Also, the parties will need to agree on the UK's continued contribution to the EU budget for the period of the extension.

The WAB provides that the Government may not agree an extension of the implementation period unless the House of Commons approves it, but this requires the Government to come to the Commons seeking approval. To the chagrin of some MPs, the WAB does not, in its current form, allow the House of Commons itself to force the Government to seek an extension to the implementation period.

## **WHAT HAPPENS IF EU LAWS CHANGE DURING THE IMPLEMENTATION PERIOD?**

The WAB would preserve the ECA so that new EU laws that come into effect during the implementation period are given effect as part of domestic law in the same way as if the UK continued to be a member state. The WAB would also amend the 2018 Withdrawal Act so that any EU law that applies in the UK at the end of the implementation period will be incorporated into UK law. This means that any developments in EU law during the implementation period will be effective both during that period and afterwards, despite the UK having no role in framing the new EU law (though the pace of EU procedure is such that most EU law that might come into force in the next 14 months is at least already foreshadowed).

The WAB would also delay to the end of the implementation period the effect of the statutory instruments made under the 2018 Withdrawal Act remedying the deficiencies in the 'onshored' EU law arising from the UK's withdrawal from the EU, although new statutory instruments may also be needed under that Act to address deficiencies resulting from changes to EU law during the implementation period (and any deficiencies arising from the end of the implementation period). Following the end of the implementation period, any EU law brought into UK domestic law can be amended by the UK Parliament.

## **WHAT WILL HAPPEN AFTER THE IMPLEMENTATION PERIOD?**

The Political Declaration envisages that, after the implementation period, an FTA will govern the relationship between the UK and the EU. If the two parties fail to come to an agreement before the end of the implementation period, the default position would be for the parties to trade on World Trade Organisation rules (a "hard" Brexit).

Many are concerned that a hard Brexit could have serious economic and other consequences. The UK is currently able to revoke unilaterally the notice of its intention to withdraw from the EU, or the UK and the EU can agree (almost) any number of extensions to exit day in order to avoid this. There is no such flexibility at the end of the implementation period. The UK will have left the EU, and only one extension of the implementation period is possible (subject to the

Withdrawal Agreement being amended, which could itself raise complex issues). If no agreement on future relations has been reached by the end of the implementation period (as extended), there will be a hard Brexit.

## **HOW DOES THE WAB AFFECT THE NEGOTIATIONS OF THE EU-UK FUTURE RELATIONSHIP?**

The WAB offers Parliament some control of the negotiations for and ratification of the 'future relationship treaty' (i.e. the FTA or other agreement), dispensing with the provisions contained in the Constitutional Reform and Governance Act 2010. This Act requires any treaty to be laid before Parliament for 21 days prior to its ratification and for the possibility of the House of Commons to object to ratification.

Under this new mechanism, the Government would need to present a statement on objectives for the future relationship with the EU within 30 House of Commons sitting days of exit day. It must obtain the backing of Parliament for this statement, which must be consistent with the Political Declaration. Parliament cannot, for example, require in the statement that the UK enter into a customs union with the EU because that would not be consistent with the Political Declaration. Negotiations with the EU cannot begin until Parliament gives its approval to the Government's objectives. Parliament can therefore veto the negotiations, but that would lead to a hard Brexit, or merely alter the emphasis within the framework laid down by the Political Declaration.

Parliament could amend the WAB to allow it a greater say in the negotiations by, for example, inserting a requirement for a customs union between the UK and the EU. That would, however, require the Government to seek to agree with the EU a change to the Political Declaration to encompass this, which would then doubtless require further approvals.

If an FTA or other agreement is agreed between the UK and the EU, the Government would not be able to ratify the future relationship treaty without securing the backing of Parliament. The Government would need to obtain a positive resolution from the House of Commons approving the treaty. The WAB also states that the Government could not ratify the treaty if the House of Lords has resolved that it should not be ratified in a specified period (although the Government could override the House of Lords' objections).

This could give MPs an opportunity to block the ratification of the long-term relationship agreement with a view to forcing a no-deal exit from the implementation period. The WAB would not provide a means by which the Government can override these requirements for the approval of the House of Commons even in exceptional circumstances.

## **HOW WOULD THE WITHDRAWAL AGREEMENT COME INTO EFFECT?**

Provided that each party has notified the Secretary-General of the Council of the European Union that the "necessary internal procedures" have been completed to give effect to the Withdrawal Agreement, the Withdrawal Agreement will come into force on the earlier of exit day or the first day of the month following receipt by the Secretary-General of these notifications. The UK's internal procedures are, essentially, the passage of the WAB. The EU

must obtain the approval of the EU's member states (by qualified majority) and the approval of the European Parliament.

## **WHAT COULD HAPPEN IF A GENERAL ELECTION IS CALLED?**

The UK Prime Minister previously proposed a snap general election to take place on 14 October, though this proposal was swiftly rejected by Parliament. On 24 October, the Prime Minister once again said that he will call a general election for 12 December. Under the Fixed-term Parliaments Act 2011, an early general election can be called if Parliament either (i) passes a motion to call an early election by a majority of two-thirds of the number of seats in the House of Commons, or (ii) passes by a simple majority of those voting a vote of no confidence in the Government. If a snap election is called and the Prime Minister's Government regains its majority in the House of Commons, the passage of the WAB through Parliament may become more straightforward. For now however, ministers and MPs remain divided.

## **CONCLUSION**

The Parliamentary situation and general political landscape in the UK remains highly volatile. However it should be of some short-term comfort that, under the WAB, things remain more or less the same for the UK during the implementation period, especially in relation to the application of EU laws. Beyond the implementation period however, the WAB can only provide limited certainty, and the pause in the bill's progress through Parliament brings with it renewed questions surrounding the Brexit timetable and the possibility of a general election.

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