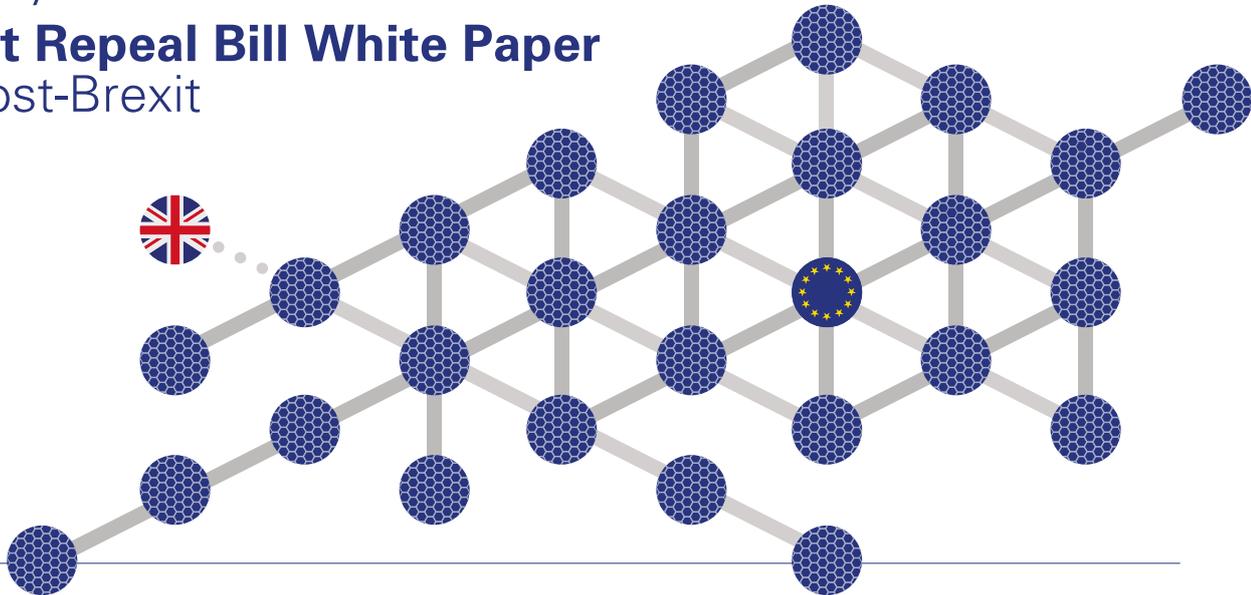


Brexit Analysis Bulletin

The Great Repeal Bill White Paper

UK law post-Brexit



The shape of the UK government's approach to dealing with the post-Brexit world is beginning to crystallise and it is clear that EU law will no longer be applicable to UK-based businesses, organisations and individuals.

On 30 March 2017 the UK Government published details of its proposed approach in a White Paper: '*Legislating for the United Kingdom's withdrawal from the European Union*'. The Government plans to implement its approach via a piece of legislation called 'The Great Repeal Bill' (the Bill). This bulletin outlines its content and the effects it will have for UK-based businesses, organisations and individuals.

Overview: a three-step process

The Bill provides for three steps to legislating for the UK's withdrawal from the EU in what the UK Government hopes will be as smooth and orderly a fashion as possible. These are:

1. Repeal of the European Communities Act 1972 (the ECA). The ECA is the statute that provides for EU law to form part of UK law, and for EU law to be supreme when there is any conflict. For Brexit to be a legal reality, it must be repealed.
2. So as to provide a degree of legal certainty and continuity, the 'conversion' of a wide range of EU law into UK law upon Brexit.
3. Ensuring that this EU-derived UK law operates

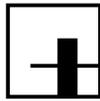
properly post-Brexit, giving the UK Government and devolved administrations the powers to make corrections and amendments.

Repealing the ECA

The Bill will repeal the ECA on the day that the UK leaves the EU (as things stand, this would be 29 March 2019). After that date, EU law will not apply in the UK. Until that date, EU law will continue to apply and operate fully in the UK.

If the Bill went no further than repealing the ECA, however, it would create significant difficulties in terms of legal certainty and continuity:

- Many areas of law and regulation derive from directly applicable EU law statutes (principally EU Regulations) or EU treaty requirements. These would simply no longer apply on Brexit, creating 'black holes' in UK law.
- Other areas of law and regulation derive from UK statutory instruments that were made under the ECA. In most cases this is how the UK implemented the requirements of EU Directives. The general position



under UK law is that any statutory instruments made under an Act of Parliament (in this case the ECA) fall away if the main Act is repealed. Again, this would create significant ‘black holes’ in UK law on Brexit.

- Much of this EU-derived law (whether it be directly applicable or implemented via statutory instruments under the ECA) will, for a variety of reasons, not function properly when it is ‘converted’ into UK law. For example, it may make reference to EU institutions or standards, and such references may not make sense post-Brexit when the UK is not a member of such institutions or a party to such standards. Similarly, an EU-derived law might be predicated on the cooperation or engagement of other Member States – it may not be possible or desirable for such cooperation or engagement to happen post-Brexit. This problem also applies to various EU law requirements that have been indirectly implemented via UK primary legislation (i.e. an Act of Parliament).

To deal with the problem of ‘black holes’ the Government proposes converting the existing body of EU law (often referred to as the *acquis communautaire*) into UK law upon Brexit. To make sure this EU-derived law is ‘Brexit-fit’ it will also provide for delegated powers to allow the Government to amend it so that it functions properly post-Brexit.

Converting EU law to UK law

The Bill will:

- Convert all directly applicable EU law (e.g. rules contained in EU Regulations) into UK law.
- Incorporate any rights contained in the EU Treaties into UK law, so that these can continue to be relied upon post-Brexit.
- Preserve all of the statutory instruments made under the ECA, so that these won’t automatically fall away when the ECA is repealed.

The Bill will also clarify the ongoing significance of the judgments of the Court of Justice of the European Union (CJEU). The power of the CJEU over EU law and how it is applied in Member States is a totemic issue for many supporters of Brexit. Accordingly, the Government’s approach to this issue seeks to strike a balance between ‘removing’ the CJEU from the UK’s legal landscape while accepting the reality that the meaning of much of the EU law that the Bill intends to incorporate into UK law can only be fully understood by reference to the CJEU’s judgments.

To this end, the Bill will provide that the meaning of any EU-derived law post-Brexit (i.e. the EU law that the Bill converts into UK law) will be determined by reference to the case law of the CJEU as it exists on Brexit. Insofar

as a judgment of the CJEU relates to an element of EU law not being incorporated into UK law by the Bill, it will not be applied. The Government proposes that these historic CJEU precedents be given the same status in UK courts as decisions of the UK Supreme Court, with lower courts being required to follow them. The Supreme Court itself is expected only to overturn them in exceptional circumstances.

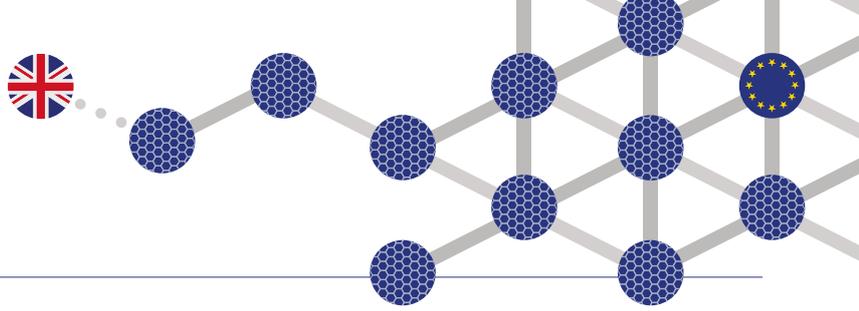
Making UK law ‘Brexit-fit’

While the above outlined ‘conversion’ measures go some way to ameliorating the risk that ‘black holes’ will appear in UK law and regulation on Brexit, they do not address the problem of confusing or unworkable references to EU institutions, standards, arrangements, etc. in those EU-derived laws.

As such, the Bill proposes to give the UK Government broad delegated powers to amend the EU-derived law, which is to be converted into UK law upon Brexit, by way of statutory instruments. The White Paper states that these delegated powers will need to allow corrections and amendments to be made to the full range of EU-derived law – including provisions in Acts of Parliament. It will also need to allow for powers which currently rest with EU bodies to be transferred to UK bodies or ministers.

The Government admits that this will be a very significant task and estimates that between 800 to 1,000 statutory instruments may be required to make the necessary corrections and amendments pre-Brexit. The Bill will allow these corrections and amendments to be made using the existing types of statutory instrument procedure. These allow for different levels of scrutiny by Parliament of the changes the Government is proposing to make in a particular statutory instrument. The White Paper suggests that a ‘lighter touch’ negative procedure (which does not require a debate) will be used for more technical amendments or corrections, whereas the more affirmative procedure (which requires a debate and approval by both Houses of Parliament) will be used for more substantive matters.

The Government intends that these delegated powers will be used only to make the corrections and amendments necessary to deal with the technical deficiencies in the EU-derived law being converted into UK law. In particular, the White Paper states that the delegated powers will not be available when the Government wishes to make a policy change to law or regulation which goes further than correcting these technical deficiencies. The Government is also considering whether further constraints on the delegated powers (e.g. a bar on making retrospective provision) would be appropriate.



In respect of EU-derived law contained in legislation which is within the competence of one of the UK's devolved administrations (e.g. the Scottish Government), the Bill will give those devolved administrations identical delegated powers to those that the UK Government will have.

The Bill will give the Government the delegated powers described above as soon as it becomes law, so that the difficult process of amending the body of EU-derived law before Brexit can begin as soon as possible.

What the Bill does not do

The Bill and the process of converting and amending the UK's EU-derived law before Brexit are quite separate from other elements of the Brexit process, formally triggered by the UK's Article 50 notification. In particular, the process whereby Parliament will vote on the final agreement arrived at between the UK and the EU is separate. Similarly, any new trade treaty with the EU will need to be ratified in accordance with the Constitutional Reform and Governance Act 2010. It appears, however, that the Bill will give the Government a limited power to implement the contents of any withdrawal agreement into UK law.

As noted above, the delegated powers that the Bill proposes to give to the Government do not allow for major policy changes to be made or new legal frameworks to be put in place. The White Paper states that, accordingly, the Government intends to introduce a number of further bills to ensure that key legal frameworks are in place before Brexit. A customs bill to establish a UK customs regime and an immigration bill to clarify post-Brexit immigration arrangements are both specifically mentioned in the White Paper.

In terms of the UK's devolution settlement, the White Paper states that the UK Government expects "intensive discussions with the devolved administrations" about how policy powers currently resting at EU level will be distributed between the UK Government and devolved administrations, and the 'common frameworks' that

may be required to ensure the UK's single market works effectively post-Brexit.

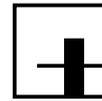
One part of EU law which will not be converted into UK law upon Brexit is the EU Charter of Fundamental Rights. This is a codification of a number of fundamental human rights which has the same legal status as the EU Treaties. The White Paper suggests that the incorporation of the Charter of Fundamental Rights is unnecessary as many of the rights it codifies exist in the other elements of EU law which are being converted in UK law by the Bill. It is also noted that the UK already has a wider human rights architecture which will continue to exist post-Brexit (notably the European Convention on Human Rights (the ECHR) as implemented by the Human Rights Act 1998 (the HRA).

Interestingly, the White Paper notes that Brexit will not affect the UK's participation in the ECHR and states that "there are no plans to withdraw from the ECHR". This is somewhat surprising as there have previously been indications that the Government (and in particular the current Prime Minister) was in favour of UK withdrawal from the ECHR and the replacement of the HRA with a 'British Bill of Rights'.

Timescales

The Bill will be introduced at the start of the next Parliamentary session, which is due to begin in May/June 2017. Once introduced, it will be debated and voted on by both Houses of Parliament.

The White Paper has provided some further detail on the Government's plan for the Bill and how it hopes to legislate for as smooth and orderly a Brexit as possible. However, many important matters still require further clarification and detail. In particular, the extent of the delegated powers provided to the UK Government and the devolved administrations will be a key issue in terms of how the Bill operates in practice.



SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS

JOINING THE DOTS: COUNTDOWN TO BREXIT

What next?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

Article 50 has been triggered and the countdown to Brexit begun. In the the run-up to our departure from the EU, members of our dedicated Brexit group will continue to interrogate the regulatory and commercial issues and advise clients on next steps.

For further information in the first instance, please contact:



Louisa Knox
Partner & Co-Chair Of Brexit Advisers
T +44 (0)131 473 5216
M +44(0)781 800 2191
E louisa.knox@shepwedd.com



Gordon Downie
Partner & Co-Chair Of Brexit Advisers
T +44 (0)131 473 5162
M +44(0)771 863 7298
E gordon.downie@shepwedd.com



Bookmark our Brexit Advisers page for a comprehensive collection of Brexit updates and guidance

shepwedd.com/brexit

