

## client alert

EU | BREXIT |

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### BREXIT ARTICLE - THE DEBATE AROUND THE EUROPEAN UNION (WITHDRAWAL) BILL

The European Union (Withdrawal) Bill (the Bill) is presently being debated in the House of Commons, and is the subject of great controversy. The Bill was first mooted in the Prime Minister's speech to the Conservative Party Conference in October last year, when it was described as the "Great Repeal Bill", a title designed to stir memories of the Great Reform Act of 1832, a landmark of British political history.

The Bill was introduced in the House of Commons on 13 July 2017. It has 4 main functions:

- it repeals the European Communities Act of 1972 (**ECA**) with effect from the day the UK leaves the EU;
- it converts EU law as it stands at the moment of exit into domestic law before the UK leaves the EU;
- it creates power to make secondary legislation, including temporary powers to enable corrections to be made to the laws that would otherwise no longer operate appropriately once the UK has left the EU and to implement a withdrawal agreement; and
- it maintains the current scope of devolved decision making powers in areas currently governed by EU law.

Whilst it might seem counterintuitive to mark the UK's exit from the EU by importing the whole of EU law (much of it greatly disliked) into UK domestic law - which is presumably why the name "Great Repeal Bill" was quietly dropped - it is widely acknowledged that there was no real workable alternative; there is simply not enough time to review and amend appropriately every piece of EU legislation before the UK's scheduled departure date (29 March 2019). The Government is seeking wide powers to make changes to the legislation incorporated into UK law by means of secondary legislation, thus avoiding the scrutiny of the full Houses of Parliament, and this is proving controversial.

Many Acts of Parliament (**primary legislation**) empower ministers to make further regulations within their scope (**secondary legislation**), usually by statutory instrument (**SI**). Many commentators are suspicious of secondary legislation in general, and the provisions in primary legislation which empower Ministers to pass secondary legislation are often derisively labelled "Henry VIII clauses", harking back to the Statute of Proclamations of 1539 by which Henry VIII asserted his right to change legislation passed by Parliament unilaterally, and to give his own proclamations full force in law. In fact secondary legislation is a normal (even indispensable) and usually uncontroversial feature of modern government; around 3,500 SIs are made each year. Some SIs are laid subject to affirmative procedure - these require the formal approval of both Houses of Parliament before they become law. SIs under negative procedure, on the other hand, will automatically become law without debate unless there is an objection from either House. SIs can only be approved or rejected - Parliament does not have the power to amend SIs. Presently about two thirds of all SIs are subject to negative procedure and are not actively considered before Parliament. The concern is that, due to the sheer volume of legislation, major legislative changes could be effected without appropriate scrutiny or debate.

The House of Lords will play an important role in the review of SIs proposed by the Government after the Bill passes into law, and Brexit has occurred. This is significant because, whilst the Prime Minister has, for the time being at least, a slim overall majority in the House of Commons (thanks to her alliance with the Democratic Unionist Party MPs) the Conservatives do not have a majority in the House of Lords, and have not done so since the reduction in the number of hereditary peers brought about by the House of Lords Act of 1999.

There are two House of Lords committees which consider secondary legislation: the House of Lords Delegated Powers Scrutiny Committee and the House of Lords Secondary Legislation Scrutiny Committee.

The Delegated Powers Scrutiny Committee reviews the extent to which legislative powers are delegated by Parliament to government ministers, and examines all Bills with delegating power which allow SIs to be made before they begin their passage through the House. The Secondary Legislation Scrutiny Committee considers every negative or affirmative SI with a view to determining whether the special attention of the House should be drawn to it on any of the following grounds:

- it is politically or legally important or gives rise to issues of public policy;
- circumstances have changed since the passage of the parent Act that render it inappropriate;
- it may imperfectly achieve its policy objectives;
- there is insufficient information to understand the policy objective and intended implementation; or
- there appear to be inadequacies in the related consultation process.

The House of Commons does not at present have an equivalent of either of these committees. It may be that more resources will have to be devoted to the scrutiny of SIs post Brexit if fears of 'legislation by the back door' are to be allayed.



Check out our dedicated **Gide / Brexit** LinkedIn page to learn more about the consequences and legal implications of Brexit.

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